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IN THE

Supreme Court Of The United States

OCTOBER 1996 TERM

ROBERT J. LOEW AND DARREL L. MATTESON,

Petitioners,

v.

DEAN HIBBARD AND H.D. GARRISON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

ALAN EPSTEIN
DAVID R. BROUGHAM
OF HALL & EVANS, L.L.C.
1200 - 17th Street, Suite 1700
Denver, Colorado 80202
(303) 628-3300

Attorneys For Petitioners
ROBERT J. LOEW AND
DARREL L. MATTESON

30 p/8

QUESTIONS PRESENTED

1. Whether the Colorado Supreme Court departed from this Court's instruction that substantive due process should not be used as a catch-all remedy for allegedly egregious public official conduct where a more specific constitutional protection exists.

2. Whether the Colorado Supreme Court departed from this Court's rule that an allegedly random and unauthorized deprivation of property does not violate the procedural protections of the due process clause if an adequate and meaningful post-deprivation remedy exists for the loss of that property.

LIST OF PARTIES TO THE PROCEEDING

1. County of Adams, State of Colorado
2. Robert J. Loew and Darrell L. Matteson, petitioners
3. Dean Hibbard and H.D. Garrison, respondents

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OPINIONS BELOW

The decision of the Colorado Supreme Court has been published at 918 P.2d 212 (Colo. 1996). The decision of the Colorado Court of Appeals has been published at 900 P.2d 1254 (Colo. App. 1994).

JURISDICTION

The judgment of the Colorado Supreme Court was entered on June 17, 1996. This Court has jurisdiction to entertain this petition for certiorari pursuant to the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves 42 U.S.C. § 1983:

> **Civil Action for Deprivation of Rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In 1988, the County of Adams, Colorado ("the County") adopted Ordinance No. 3 pursuant to § 30-15-401, et seq., C.R.S. This Ordinance was adopted for the purpose of preventing environmental blight. Failure of a property owner to comply with

Ordinance 3 subjects the owner to enforcement proceedings. In the event of an Ordinance violation, a notice is given to the property owner, and the property must be brought into compliance. In the event of non-compliance, a hearing is conducted, and an administrative law judge ("ALJ") determines whether causes of blight exist, and, if they do, the ALJ issues an order compelling the property owner to remove the causes of the blight.

In October 1989, plaintiff Hibbard received notice from the County Attorneys' Office that a zoning inspector had determined his property violated Ordinance 3 in certain particulars, including the presence of "out-buildings" and "vacant dwellings" determined by the inspector to be blighting factors. Hibbard did not remove the blight factors and a hearing was conducted before an ALJ. At this hearing, Mr. Hibbard represented himself, and the County was represented by defendant Matteson.

After the hearing, the ALJ determined the existence of numerous violations of Ordinance 3, including the presence of "a building which is vacant and was the subject of a fire in 1983" and "old and unsightly out-buildings." The order directed Hibbard to remove the offending materials and buildings by a specified date, and, in the event of noncompliance with the ALJ's order, directed that the County could enter the premises and perform the cleanup of the property.

Hibbard failed to comply with the ALJ's order and the County subsequently removed the offending materials and buildings.

Plaintiffs then instituted this action. Plaintiffs sought a declaratory judgment that Ordinance No. 3 was invalid and/or unconstitutional to the extent it permitted the County to destroy buildings considered to be a blighting factor. Plaintiffs also sought damages against defendants in their official capacities under 42 U.S.C. § 1983 because of the destruction of the second building, items of personalty within that building, and for damage to an underground tank, pump, and well.

After trial to the court, the court issued a written order and judgment. The court upheld the validity and constitutionality of Ordinance No. 3. However, the court determined that the ALJ's order did not authorize destruction of the second building or the removal of the personal property within it. The court rejected defendants' contention that plaintiffs could not maintain a § 1983 action because they had failed to exhaust state remedies, including inverse condemnation. The court therefore concluded that plaintiffs' property was taken without just compensation, and awarded Hibbard $10,000 for the destruction of his second building and Garrison $3,500.00 for the personal property destroyed in the second building. The court concluded that plaintiffs " . . . have shown no different damages under 42 U.S.C. § 1983 than those proven under a condemnation theory . . . ".

The Court of Appeals affirmed in part and reversed in part. The Court held that Ordinance No. 3 was invalid to the extent it purported to authorize the destruction of any building through administrative proceedings. This conclusion was reached under Colorado's county powers statute on grounds unrelated to any federal constitutional infirmity. The Court of Appeals reasoned that § 30-15-401(1)(a), C.R.S. only authorized the removal of rubbish, including trash, junk, and garbage, but not buildings. The Court held that the County was liable under 42 U.S.C. § 1983 because Ordinance No. 3 constituted a "policy" which resulted in a "taking" of plaintiffs' property without compensation.

The Court of Appeals also held the County liable because of the individual county attorneys' interpretation of the ALJ's order as including the second building. The Court reasoned that their decision also constituted a "policy" resulting in an unconstitutional "taking" for which the County was liable. The Court of Appeals held that the individual defendants did not enjoy qualified immunity for destruction of the second building because one of them "knew" that the order did not cover it.

However, the Court also determined that the individual defendants did enjoy qualified immunity for any damage to the fire damaged building since it was not clearly established that Ordinance No. 3 was "partially invalid."

The Court of Appeals also determined that the trial court erred in refusing to enter any award for damage to the underground tank, pump, and well if such damages resulted from the destruction of the fire damaged building because its destruction occurred as a result of the County's "invalid" Ordinance. The Court determined that only the County, and not the individual defendants, would be liable for such destruction. Finally, the Court remanded for redetermination of attorney fees under 42 U.S.C. § 1988.

The Colorado Supreme Court granted certiorari with respect to the following two issues:

1. Whether the Court of Appeals erred in holding the County liable for destruction of property under 42 U.S.C. § 1983.

2. Whether the Court of Appeals erred in holding the County attorneys liable for destruction of property under 42 U.S.C. § 1983.

The Colorado Supreme Court first held that the Court of Appeals erred in holding the County liable under 42 U.S.C. § 1983. The Court reasoned that the two individual county attorneys were not "policymakers" as a matter of law. In reaching its conclusion, the Colorado Supreme Court applied the test for determining whether a municipal employee is a "policymaker" for purposes of liability under 42 U.S.C. § 1983 articulated by this Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *County of Adams v. Hibbard*, 918 P.2d 212, 216-220 (Colo. 1996).

The Colorado Supreme Court then held that the individual county attorneys were liable under 42 U.S.C. § 1983. 918 P.2d at 220-221. The Court held that the county attorneys deprived plaintiffs of their procedural and substantive due process rights by causing the destruction of their property. 918 P.2d at 221.

Justice Mullarkey, with whom Justice Kourlis joined, concurred and dissented. 918 P.2d at 221-225. Justice Mullarkey noted numerous procedural and factual problems with the majority's reasoning and ultimately concluded:

> . . . I would conclude that the plaintiffs have not proven a constitutional tort. It may be that the plaintiffs can pursue common law torts such as trespass or conversion against the individual defendants, but, in my view, they have no claim against these defendants under 42 U.S.C. § 1983.

918 P.2d at 225.

STATEMENT OF RELATED CASES

There are no related cases.

REASONS FOR GRANTING THE WRIT

I. THE COLORADO SUPREME COURT ERRED IN APPLYING SUBSTANTIVE DUE PROCESS ANALYSIS INSTEAD OF THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT.

The Colorado Supreme Court improperly utilized the substantive component of the Fourteenth Amendment's Due Process Clause as a catch-all provision for allegedly egregious governmental conduct rather than utilizing the Fifth Amendment's Just Compensation Clause as the explicit textual source of constitutional protection germane to the plaintiffs' claim. In so doing, the Colorado Supreme Court's decision failed to heed this Court's rule that a plaintiff's constitutional claim must be analyzed under a specific constitutional provision when one is readily applicable instead of substantive due process. The Colorado Supreme Court's error warrants this Court's review to clarify the interplay between the Just Compensation Clause of the

Fifth Amendment and the substantive due process protections of the Fourteenth Amendment in land-use regulation disputes.

First, the Colorado Supreme Court's decision omitted the critical initial step in analyzing any § 1983 claim, identifying the specific constitutional right allegedly infringed. *Albright v. Oliver,* 114 S. Ct. 807, 811 (1994); *Graham v. Conner,* 490 U.S. 386, 394 (1989); *Martinez v. State of California,* 444 U.S. 277, 284 (1980); *Baker v. McCollan,* 443 U.S. 137, 140 (1979). Instead, the Colorado Supreme Court recast the plaintiffs' claims in substantive due process terms without critical examination when even a cursory review of the nature of the plaintiffs' claim would have revealed its genesis as a government taking without just compensation. The plaintiffs allege the County and the individual defendants improperly and unreasonably destroyed their property by razing it pursuant to the County's blight removal ordinance and the ALJ's order. In alleging government actions destroyed, or completely interfered with their use of their property, the plaintiffs' allegations present a classic "takings" scenario properly analyzed under the Just Compensation Clause of the Fifth Amendment.

The necessity of identifying the specific constitutional provision at issue is doubly important in cases raising substantive due process claims because of the pervasive difficulty in crafting concrete standards for judicial application in this area. *Collins v. Harker Heights, Tex.,* 503 U.S. 115, 125 (1992). In *Moore v. City of East Cleveland,* 431 U.S. 494 (1977), the Court recognized the area of substantive due process, "has been at times a treacherous field for this Court." *Id.* at 502. As a direct result of past experience, "the Court has been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins,* 503 U.S. at 125. In the post-*Lochner* era, the Court has carefully circumscribed substantive due process protections to, "a realm of personal liberty where the government may not enter." *Planned Parenthood v. Casey,* 505 U.S. 833, 847 (1992).

This sacrosanct personal sphere free from governmental meddling includes individual and personal decisions concerning marriage, procreation, contraception, family relationships, child rearing, and one's own bodily integrity. *Id.* at 85 (discussing and collecting cases). The Court has expressed an extreme reluctance to expand substantive due process into additional areas.

As a result of these concerns, the Court has limited the applicability of general substantive due process protections when a more specific constitutional right applies. This thesis or theme of the Court's precedents has been present at least since *Moore,* where the Court candidly acknowledged, "[t]here are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights." *Moore,* 431 U.S. at 502. In *Graham,* the Court's long-standing concerns crystallized into a rule of law. There, the Court held § 1983 claims of excessive force must be advanced and analyzed under either the Fourth or Eighth Amendment, instead of substantive due process. *Graham,* 490 U.S. at 394-95. "The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized 'excessive force' standard." *Id.* at 394 (citing *Tennessee v. Garner,* 471 U.S. 1, 7-22 (1985) and *Whitley v. Albers,* 475 U.S. 312, 318-326 (1986)). Following *Graham,* in *Albright,* the Court both further clarified and generalized the emerging rule of constitutional law. "Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Albright,* 114 S. Ct. at 813 (quoting *Graham,* 490 U.S. at 395). While this rule stems from a longstanding jurisprudential concern animating much of this Court's substantive due process discourse, the specific articulation of the rule has occurred in the context of the Fourth and Eighth Amendments. The question presented in the instant petition is whether the general recognition in these cases of the necessity of focusing on the most specific constitutional standard available should also apply in the context of the Just Compensation Clause of the Fifth Amendment and in land use regulation.

Importantly, however, this petition does not ask this Court to expound on these constitutional principles on a tabula rasa. In addition to this Court's precedents discussing the interplay between substantive due process analysis and the specific guarantees of the Bill of Rights described above, two United States Courts of Appeal have concluded the Just Compensation Clause of the Fifth Amendment was an explicit textual source of protection precluding additional relief under a substantive due process theory. In *Bateman v. City of West Bountiful*, 89 F.3d 704 (10th Cir. 1996), following several of its earlier precedents, the Tenth Circuit "held that the ripeness requirement of *Williamson* [473 U.S. 172 (1985)] applies to due process and equal protection claims that rest upon the same facts as a concomitant takings claim." *Id.* at 709. The court reasoned, "we are reluctant in the context of a factual situation that falls squarely within [the Takings Clause] to impose new and potentially inconsistent obligations upon the parties under the substantive or procedural components of the Due Process Clause." *Id.* (quoting *Miller v Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991)). Similarly, in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), the Ninth Circuit held the Fifth Amendment provided an explicit textual source of constitutional protection, thus preempting the plaintiffs' claim based on the more generalized notion of substantive due process. *Id.* at 1324. In addition to these two decisions, several federal district courts have also applied the *Albright* rule in the takings context. *See Rockler v. Minneapolis Community Development Agency*, 866 F. Supp. 415, 420 (D. Minn. 1994); *Milne v. Township of Oregon*, 777 F.Supp. 536, 537 (E.D. Mich. 1991); *Crooked Lake Development, Inc. v. Emmet County*, 763 F.Supp. 1398, 1404 (W.D. Mich. 1991); *Pearson v. City of Grand Blanc*, 756 F. Supp. 314, 317 (E.D. Mich. 1991), *aff'd on other grounds,* 961 F.2d 1211 (6th Cir. 1992). The Colorado Supreme Court's application of general substantive due process principles without identifying the Just Compensation Clause as the explicit textual source of the applicable constitutional standard directly conflicts with the decisions of these federal courts.[1] More significantly, the decision challenged here creates a generic § 1983 claim for allegedly flagrant governmental conduct in any area of public entity action.

In contrast, several other Circuit Courts of Appeal continue to apply substantive due process analysis in as-applied land-use regulation and zoning disputes. For example, in *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3rd Cir. 1995), *cert. denied*, 116 S. Ct. 352 (1995), the Third Circuit analyzed a challenge to the denial of a use variance by the Board in substantive due process terms. The court concluded, "in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached." *Id.* at 601. Similarly, the Seventh Circuit has "recognized the potential for a substantive due process claim in the context of land-use decisions that are arbitrary and unreasonable, bearing no substantial relationship to the public health, safety or welfare." *Doherty v. City of Chicago*, 75 F.3d 318, 324 (7th Cir. 1996). The First Circuit has recognized at least the possibility of a substantive due process claim in the land-use context. "[W]e have never announced a rule precluding district courts from finding substantive due process violations by land use planning officials in every conceivable case. Rather, "[o]ur cases make clear that a regulatory board does not transgress constitutional due process requirements merely by making decisions for erroneous reasons or by making demands which arguably exceed its authority under the relevant state statutes.' " *Licari v. Ferruzzi*, 22 F.3d 344, 349-50 (1st Cir. 1994) (quoting *Amsden v. Moran*, 904 F.2d 748, 757 (1st cir. 1990) *cert. denied*, 498 U.S. 1041 (1991)).

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[1] Further, a variety of other courts have also applied this general rule outside the specific context from where it originated. *See e.g., United States v. Edmonds,* 80 F.3d 810, 833 and n. 6 (3rd Cir. 1996) (Alito, J., concurring in part and dissenting in part) (Sixth Amendment); *pet. for cert. filed, 65 U.S.L.W. 3034 (U.S. July 3, 1996) (No. 96-25); Geld Group v. Koby,* 63 F.3d 1528, 1539 (10th Cir. 1995) (First Amendment and Equal Protection Clause); *Kaluczky v. City of White Plains,* 57 F.3d 202, 211 (2d Cir. 1995) (First Amendment); *Nestor Colan Median & Secesores, Inc. v. Custodio,* 964 F.2d 32, 46 (1st Cir. 1992) (First Amendment); *Holmes v. California Army National Guard,* 920 F. Supp. 1510, 1536 (N.D. Cal. 1996) (First Amendment and Equal Protection Clause); *Roosevelt Elementary Sch, Dist. No 66 v. Bishop,* 877 P.2d 806, 811 (Ariz. 1994) (specific educational provisions of Arizona Constitution rather than more general privileges and immunities provision applied). The Colorado Supreme Court's analysis also implicitly conflicts with these precedents.

In addition, in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), this Court concluded the Fifth Amendment's Just Compensation Clause provided the proper standard for reviewing a challenge to the conditions placed upon property redevelopment by a zoning board. The Court specifically rejected the dissent's contention substantive due process provided the appropriate decisional matrix for determining the validity of the zoning board's actions. *Id.* at 2316 n.5. *Dolan* provides additional support for the conclusion the Colorado Supreme Court should have applied takings rather than substantive due process principles in analyzing this case.

In the instant case, a takings analysis is more appropriate than a substantive due process analysis for at least two reasons. First, the state compensation prong of the ripeness requirement applicable to takings cases may not apply in the same fashion under a substantive due process standard. This Court has held a takings claim is not ripe for federal court consideration until the aggrieved property owner has resorted to any available state procedures and been denied just compensation. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson*

City, 473 U.S. 172, 194-97 (1985).[2] Colorado provides either a direct takings remedy based on Colo. Const. art II, § 15 on a trespass or conversion claim, neither of which the plaintiffs availed themselves of in this case. *State, Dept. of Health v. The Mill,* 809 P.2d 434, 439-40 (Colo. 1991); *Ossman v. Mountain States Telephone and Telegraph Co.,* 184 Colo. 360, 520 P.2d 738 (Colo. 1974). As a result, allowing the plaintiffs to state their claim in substantive due process terms bypasses *Williamson's* state compensation prong of the ripeness requirement. It is plainly inconsistent to require one plaintiff to exhaust his or her state remedies while allowing another to avoid this requirement simply because their respective claims are advanced under different constitutional theories. Here, the Colorado Supreme Court specifically refused to address the question of whether the plaintiffs' claim was ripe for review under the *Williamson* standard. *County of Adams v. Hibbard,* 918 P.2d 212, 216 (Colo. 1996). Second, the plaintiffs in this case allege a physical invasion and destruction of their property which would be a categorical taking under this Court's precedents. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1005 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 435-440 (1982). Analysis under these physical invasion takings precedents provides a much clearer standard for judicial consideration than the often murky terrain of substantive due process.

Finally, the Colorado Supreme Court applied substantive due process analysis in its decision despite the trial court and the Colorado Court of Appeals' recognition the plaintiffs had raised a takings claim in addition to, or instead of, their due process claim. Initially, the Colorado Supreme Court broadly framed the issue under consideration at the outset of its opinion.

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[2] In *Williamson,* this Court recognized that ripeness required both a final decision from the regulating agency and an attempt to obtain compensation through state proceedings for a § 1983 claim based upon a Just Compensation Clause violation. Without addressing whether the Due process Clause provided another applicable constitutional standard for the over regulation of private property, this Court found that the final decision prong of the ripeness requirement applied to such a theory. *Id.* at 195-197.

> The Supreme Court in *Monroe v. Pape,* 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961), held that 42 U.S.C. § 1983 (1988) must be 'read against the background . . . that makes a [person] responsible for the natural consequences of his [or her] actions.' Today, thirty years hence, we must decide whether a county or county officials must be held accountable under § 1983 for conduct that is designed to cause the outright destruction of a citizen's property. On the record before us, we conclude that the intentional misconduct of county officials causing the destruction of private property is a species of tort within the reach of § 1983 and we hold that government officials may be held personally accountable for the unauthorized and deliberate misbehavior under that Congressional enactment.

Hibbard, 918 P.2d at 213. In summarizing its holding the individual defendants could be held liable for their conduct, the Court stated, "Because the individual defendants knowingly and intentionally acted outside their authority under the ALJ order and deliberately deprived plaintiffs of their procedural and *substantive due process* rights by causing the arbitrary destruction of their private property, we hold them individually liable for their unwarranted conduct." *Id.* at 220 (emphasis added). The Court's general discussion contains no further distinct reference to the constitutional right or rights under consideration. In contrast, both the Colorado Court of Appeals and District Court of Adams County acknowledged that plaintiffs brought a takings claim under the Fifth Amendment.

First, in addressing the individual defendants' qualified immunity, the lower appellate court framed the issue as whether, "they reasonably should have known that a county's destruction of private property under the circumstances would constitute a 'taking' of plaintiffs' property without compensation or due process of law." *Hibbard v. County of Adams,* 900 P.2d 1254, 1263

(Colo. App. 1994). In continuing its discussion, the court concluded, "as attorneys for the County, the individual defendants were charged with the knowledge that a county's deliberate destruction of private property, if not lawfully authorized, constitutes a taking of property without compensation and without due process of law." *Adams, supra,* at 1264. Second, the district court specifically analyzed the plaintiffs' claims as a taking. The court concluded, "the destruction of this [garage/shop] building was not authorized by the administrative law judge's order and that the County's actions constituted a taking for which Plaintiff Hibbard is legally entitled to be compensated." *Hibbard v. County of Adams,* No. 89CV2876, slip. op. at 3 (D. Ct. Adams County Apr. 14, 1992). Similarly, "[a]s to Plaintiff Garrison, since his property was in the building improperly razed by the County, the Court finds and concludes that there was also a taking of his property and that he is entitled to compensation therefor." *Id.* at 4. The district court simply did not treat the plaintiffs' claim as implicating substantive due process concerns. No language in the district court's Order supports any interpretation other than the court thought it had a takings claim before it.

In conclusion, the Colorado Supreme Court applied the wrong legal standard in this case by analyzing the plaintiffs' claims in substantive due process rather than takings terms. This Court should review this erroneous decision to establish the appropriate constitutional standard for analyzing challenges to land-use and zoning regulations under § 1983. As this petition describes, the lower federal courts, and the state courts have reached vastly contradictory determinations concerning whether substantive due process or takings principles or both are applicable. The problem is particularly acute in Colorado because the Tenth Circuit's and the Colorado Supreme Court's analyses diverge sharply, meaning cases heard in federal and state court in Colorado could likely result in disparate outcomes raising the distinct possibility of wholesale forum shopping since § 1983 cases may be pursued in either federal or state court. No doubt before long other jurisdictions will face analogous dilemmas. This Court's review of the Colorado Supreme Court's decision would provide needed consistency to this increasingly important area of the law.

In addition to establishing a consistent standard, other distinct reasons support this Court's accepting review. First, a "takings" analysis provides a concrete standard in contrast to the amorphous standards and precedents in the area of substantive due process. Second, the identical policy considerations underlying *Williamson* and its progeny support applying the ripeness requirement to challenges to land-use and zoning ordinances regardless of what constitutional provision a plaintiff chooses to frame her claim around. Third, the facts of this case lend themselves to a takings analysis since they present a categorical taking. For all the above reasons, the defendants ask this Court to review the Colorado Supreme Court's misapplication of substantive due process principles in the instant case.

II. THE COLORADO SUPREME COURT ERRED IN REACHING AND RESOLVING THE MERITS OF THE PLAINTIFFS' PROCEDURAL DUE PROCESS CLAIM.

The Colorado Supreme Court erred in reaching and resolving the merits of the plaintiffs' claim the individual defendants' actions violated their procedural due process rights for two reasons. First, the Court should have analyzed the plaintiffs' claim under the Just Compensation Clause of the Fifth Amendment. Second, the post-deprivation procedures and remedies available under Colorado law satisfied procedural due process.

A. THE COLORADO SUPREME COURT ERRED IN APPLYING PROCEDURAL DUE PROCESS ANALYSIS INSTEAD OF THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT.

As argued above, the plaintiffs' procedural due process claim, like their substantive due process claim, is also precluded by the explicit textual source provided by the Just Compensation Clause of the Fifth Amendment.

B. PROCEDURAL DUE PROCESS WAS SATISFIED BY THE POST-DEPRIVATION PROCEDURES AVAILABLE UNDER COLORADO LAW.

In analyzing whether the plaintiffs' procedural due process rights were violated, the Colorado Supreme Court failed to consider *Parratt v. Taylor,* 451 U.S. 527 (1981) and its progeny. Thus, the Court never addressed the threshold question whether any of the available procedures under Colorado law satisfied due process. The Court's omission was error. This Court should review this issue to clarify the operation of the *Parratt* doctrine in land-use regulation and takings cases.

The plaintiffs allege the activities of the individual defendants deprived them of their property without due process of law. The Colorado Supreme Court analyzed the plaintiffs' claim as, at least in part, alleging an infringement of their procedural due process rights. The Court described the defendants' conduct as implicating both the plaintiffs "*procedural* and substantive due process rights." *Hibbard*, 918 P.2d at 220 (emphasis added). The Court's analysis indicates it considered whether the defendants' actions violated both the procedural and substantive components of the Due Process Clause of the Fourteenth Amendment.

In similar fashion to its analysis under substantive due process, the Colorado Supreme Court neglected an important step in addressing the plaintiffs' procedural due process claim. Namely, the availability and adequacy of the State's postdeprivation procedures. In a series of cases beginning with *Parratt*, the Court has outlined the rule that a deprivation of property based on the random and unauthorized actions of a state employee does not violate the procedural protections of the Due Process Clause if an adequate and meaningful postdeprivation remedy for the loss of property exists. *Zinermon v. Burch*, 494 U.S. 113, 129-30 (1990); *Hudson v. Palmer*, 468 U.S. 517, 531-33 (1984); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 435 (1982); *Parratt,* 451 U.S. at 541-42.

Initially, in *Parratt*, the Court considered whether the negligent loss of a Nebraska prisoner's hobby kit by prison officials constituted a violation of due process. *Id.* at 529. In concluding the state's tort remedies provided an adequate procedural mechanism for the prisoner to seek redress for his property deprivation, the Court reasoned:

> The justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act of a state employee. In such a case, the loss is not the result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place.

Id. at 541. Next, in *Logan*, the Court examined the contention *Parratt* applied to the Illinois Fair Employment Practices Commission's failure to hold a required conference within the requisite 120-day time period. *Logan*, 455 U.S. at 435-36. The Court concluded the rule was inapplicable because the injury in this case was the result of an established state procedure rather than a random and unauthorized act by a maverick state employee. *Id.* "Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference . . . *Parratt* was not designed to reach such a situation." *Logan*, 455 U.S. at 436.

Subsequently, in *Hudson* the Court again addressed the scope of the *Parratt* doctrine. There, a Virginia prisoner claimed a guard intentionally destroyed his property while searching his cell. *Hudson*, 468 U.S. at 520. The Court expanded *Parratt* to apply to intentional conduct in concluding the Commonwealth's postdeprivation procedures satisfied due process. *Id.* at 536. The Court explained:

> The underlying rationale of *Parratt* is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply "impracticable" since the state cannot know when such deprivations will occur. We can discern no logical distinction between negligent and intentional deprivations of property insofar as the "practicability" of affording predeprivation process is concerned. The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct.

Id. at 533. Finally, in *Zinermon,* the Court addressed the constitutional adequacy of Florida's voluntary commitment procedures to ensure patients were not erroneously committed to state mental health institutions without their informed consent. *Zinermon,* 494 U.S. at 114. The Court held hospital officials could not "escape § 1983 liability by characterizing their conduct as a 'random, unauthorized' violation of Florida law which the state was not in a position to predict or avert, so that all the process Burch could possibly be due is a postdeprivation damages remedy." *Id.* at 138. In so holding, *Parratt* was distinguished on the grounds the hospital officials' responsibility to determine a patient's competence to voluntarily commit himself was predictable, predeprivation procedures were available, and the officials' conduct was not outside the scope of their authority. *Id.* at 136-39.

To date, this Court has not applied *Parratt* in the present context of the ultra vires application of a land-use regulation and administrative order by county officials. However, in discussing the ripeness doctrine in *Williamson,* the Court noted the analogy between it and *Parratt.* Both doctrines arise from the Court's understanding the plaintiff's injury is not complete until the state has denied her an adequate postdeprivation remedy in procedural due process cases, or just compensation under takings analysis. *Williamson,* 473 U.S. at 195 and n.14.

The Colorado Supreme Court's refusal to consider *Parratt* flies directly in the face of several Circuit Courts of Appeal decisions. In *Yates v. Jamison,* 782 F.2d 1182 (4th Cir. 1986), the Fourth Circuit held that homeowner's procedural due process claims for a municipality's demolition of a residence without notification should be dismissed under *Parratt.* The Fourth Circuit found that the demolition occurred in violation of the municipality's notification and hearing proceedings. Since the demolition was unauthorized, the court found that the plaintiffs' due process rights had not been violated as plaintiffs could pursue a state inverse condemnation action as an adequate postdeprivation remedy. *Id.* at 1185. Additionally, other Circuit Courts of Appeal have applied *Parratt* in a land-use or takings dispute. *See Cathey v. Guenther,* 47 F.3d 162, 164 (5th Cir. 1995) ("Some takings, however, cannot fairly be attributed to the state because they represent the random and unauthorized actions of state actors."); *Licari v. Ferruzzi,* 22 F.3d 344, 348 (1st Cir. 1994) ("There is a further reason why the revocation of the building permits did not violate Colonial's right to procedural due process: postdeprivation remedies were available.").

The instant situation falls squarely within the scope of the *Parratt* doctrine. The Court's cases have identified three factors to judge whether the availability of postdeprivation procedures satisfies due process: (1) the predictability of the state actor's conduct; (2) the possibility of predeprivation process to prevent the deprivation; and (3) whether the state actor's conduct was unauthorized. *Zinermon,* 494 U.S. at 136-38; *Parratt,* 451 U.S. at 541-42. *Yates,* 782 F.2d at 1185. The individual defendants' conduct in destroying the plaintiffs' property satisfies all three of these requirements.

First, the County could not predict the individual defendants' actions. The County had no way of knowing the County Attorney and his assistant would order the razing of a building outside the scope of the ALJ's order leading to the complete destruction of the plaintiffs' property or the procedures required by Ordinance 3. The Colorado Supreme Court specifically concluded the damage to the plaintiffs' property was not a result of County policy, the individual defendants had no discretion in applying the blight removal ordinance, and they were not policy makers for the purposes of municipal liability under § 1983. *Hibbard*, 918 P.2d at 217-18. Under these circumstances, this case presents the identical situation as the prisoner guard's random and unauthorized intentional deprivation of the prisoner's property in *Hudson*. 468 U.S. at 533. The County could not "anticipate and control in advance the random and unauthorized intentional conduct of its employees" in bypassing proper state procedures to order the razing of a building outside the scope of the ALJ's order. *Id.* at 533.

Second, no predeprivation procedures could have prevented the deprivation of the plaintiffs' property. The availability of preventative predeprivation procedures is linked to the ability of the County to predict when a deprivation is likely to occur. Here, the individual defendant's actions in ordering the razing of the additional building outside the scope of the authority provided by the ALJ's order was completely unpredictable. Accordingly, "predeprivation procedures are simply 'impracticable' since the [County] cannot know when such deprivations will occur." *Id.* at 533.

Third, the individual defendants' actions were clearly not authorized by the County. The Colorado Supreme Court specifically concluded the County Attorney and his assistant acted outside the scope of the ALJ's order. *Hibbard*, 918 P.2d at 217-18. As such, their actions are not attributable to the County, and do not constitute municipal policy. Unlike the situation in *Logan*, the deprivation of the plaintiffs' property occurred not because of an established County procedure, but was due to the random and unauthorized actions of the individual defendants. *Compare Logan*, 455 U.S. at 435-36.

In sum, the *Parratt* doctrine was specifically designed for situations like this one. The individual defendants' actions leading to the destruction of the plaintiffs' property constitute a random and unauthorized act which the County had no ability to either predict or prevent with the addition of any predeprivation procedures.

Finally, the plaintiffs had several options for possible postdeprivation remedies under Colorado law. First, the plaintiffs could have sought just compensation for the taking of their property as a direct action based on Colo. Const. art II, § 15. *The Mill*, 809 P.2d at 439-40. Second, plaintiffs could have filed a tort claim against the individual defendants in their individual capacities. For example, the plaintiffs had at least a colorable claim under either a conversion or trespass theory. *Ossman*, 520 P.2d at 741. The availability of these post-deprivation remedies for the plaintiffs to seek redress against both the County and the individual defendants for their deprivation of property was sufficient to satisfy due process under the *Parratt* doctrine. The Colorado Supreme Court's decision improperly expands the applicability of a procedural due process claim and transforms the *Parratt* doctrine into a nullity.

In conclusion, the Colorado Supreme Court failed to apply the correct legal analysis in considering the plaintiffs' procedural due process claim. This Court should review this failure to establish the operation of the *Parratt* doctrine in the context of procedural due process challenges to land-use and zoning regulations brought under § 1983. *Parratt* provides an important limitation on government liability for the random and unauthorized actions by government employees. The facts of the instant case provide another opportunity for this Court to further elaborate on the proper scope of the doctrine in an important area of the law while correcting the Colorado Supreme Court's error. For all the above reasons, the defendants ask this Court to review the Colorado Supreme Court's misapplication of procedural due process principles in this instant case.

CONCLUSION

This case presents a unique and long awaited opportunity for this Court to define the role of substantive and procedural due process in the land-use context and to mandate that under the circumstances of this case a plaintiff must first attempt to obtain compensation through state remedies before utilizing 42 U.S.C. § 1983. The Colorado Supreme Court's decision, if left undisturbed, creates a general catch-all remedy without particularized standards for allegedly wrongful conduct by public officials through substantive due process. The application of that theory in the land-use context has created a split in the lower courts that should be resolved by this Court. Finally, the expansion of both substantive and procedural due process by the Colorado Supreme Court improperly allows litigants to create federal civil rights claims which should properly be resolved by existing state common law remedies.

Dated this 13 day of September, 1996.

Respectfully submitted,

Alan Epstein
David R. Brougham
of Hall & Evans, L.L.C.
1200 - 17th Street, Suite 1700
Denver, Colorado 80202
(303) 628-3300

ATTORNEYS FOR
PETITIONERS

CERTIFICATE OF MAILING

I hereby certify that on this 15 day of September 1996, a true and correct copy of the foregoing ***PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO*** was mailed by placing the same in the United States Mail, postage prepaid, addressed as follows:

Gilbert Goldstein, Esq.
3600 S. Yosemite, Suite 870
Denver, CO 80237
303-220-8200
Attorney for Dean Hibbard & H.D. Garrison

Darrell L. Campbell, Esq.
7730 E. Belleview Ave.
Suite 204
Englewood, CO 80111-2618
303-740-7200
Attorney for Dean Hibbard & H.D. Garrison

(2)

FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court Of The United States

OCTOBER 1996 TERM

ROBERT J. LOEW AND DARREL L. MATTESON,

Petitioners,

v.

DEAN HIBBARD AND H.D. GARRISON,

Respondents.

PETITIONERS' APPENDIX

Alan Epstein
David R. Brougham
of HALL & EVANS, L.L.C.
1200 - 17th Street, Suite 1700
Denver, Colorado 80202
(303) 628-3300

Attorneys For Petitioners
Robert J. Loew and
Darrel L. Matteson

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DISTRICT COURT, ADAMS COUNTY, COLORADO

CIVIL ACTION NUMBER 89 CV 2876, DIVISION A

ORDER AND JUDGMENT

DEAN HIBBARD AND H. D. GARRISON,

Plaintiff,

vs.

COUNTY OF ADAMS, STATE OF COLORADO, *et. al.,*

Defendants.

This matter came for trial on December 3, 1991. The Court heard testimony and has received written closing arguments. For reasons set forth in a separate order dated April 14, 1992, the Court has recused itself as to the constitutionality issue raised herein and has asked the Chief Judge to assign another judge to decide that issue. The Court finds no impediment to retaining this matter for decision on the merits exclusive of the constitutionality issue.

The issues remaining for decision then, are as follows:

1. Whether the actions of Defendants in abating various items of equipment, property and improvements upon Plaintiffs' property constitute an impermissible deprivation of civil rights under 42 USC 1983.

2. Whether Defendants actions constitute a taking without compensation, in the nature of an inverse condemnation.

3. As a subset or variant of the above, the Court must first determine whether Defendants' actions are justified by reliance or administrative law Judge Ciancio's order of October 20, 1989. In the Court's view, this issue must be decided first, as the ruling on this issue will inform the rulings on the first two issues.

The administrative law judge conducted a full-fledged hearing on the blight abatement proceeding on October 20, 1991, and heard testimony and admitted evidence. By inference, the Court finds that he departed from his past practice and drafted his own findings, conclusions and order, rather than signing off on one submitted by the County, which ultimately prevailed. The County's case was presented by Defendant Matteson. The procedure is an important consideration in the Court's analysis. In the Court's view the actions of Defendants, especially Matteson and Loew, might be viewed as substantially more culpable if they, or one of them, drafted the order and then oversaw a substantial departure from the authority they had requested and received. Under that state of affairs Issue 3, *supra*, might be restated as "Did the Defendants ask for and receive authority to do specific acts and then wilfully depart from what they asked for in the abatement process?" While the distinction may appear subtle, in the Court's view it is likely to be much easier to know and understand what a self-drafted order allows, as compared to discerning the scope and intent of a judge-drafted order.

Several contextual comments seem important. First, the wisdom or desirability of the blight ordinance is not at issue; nor is the County's zoning code open for scrutiny on these issues. It is unquestionable that county governments have the power to enact land use controls. Many citizens complain that unfettered use of one's property is the American way. Such has not been the case since *Euclid v. Ambler Realty, Co.*, 272 U.S. 365, 71 L.ed. 303, 47 Sup. Ct. Rep. 114 (1926). While the Court may not be entirely in sympathy with Draconian cleanup efforts in locations which have a long history of so-called "blight," unless a constitutional challenge to the ordinance (to be dealt with separately) is successful the County may reasonably regulate uses such as the plaintiffs'.

Second, the testimony and exhibits have made it clear to the Court that the overall state of the subject property was cluttered, messy, unattractive, ill-kempt, deteriorated, and devoid of any charm, appeal or utility to any potential observer except the

Plaintiffs. This overall state of affairs provides a background against which to judge the acts of the defendants. It seems obvious that one eyesore in the midst of a manicured garden can be easily singled out for surgical excision; that same eyesore placed in the middle of a dump would not cry out for nicety of selection in terms of remedies.

Third, it is important to note that no representative of Plaintiffs was present to identify items which were not subject to the order, to remove mobile property items or to remove personalty from the buildings which were razed. Setting aside the due process (lack of notice) concerns raised by plaintiffs, the Court finds that this lack of guidance, assistance and objection makes it much less apparent in the Court's mind that Defendants acted in an overly egregious manner. Apparently Defendant Garrison did arrive prior to the time the "garage shop" building which he occupied as an *ad hoc* residence, was razed, but refused to remove his belongings, expressing his preference to force the county (presumably *via* a lawsuit) to pay him for his belongings.

Fourth, it is important to note that Plaintiffs had obtained a temporary restraining order to prevent the demolition, but that the TRO had been dissolved when Plaintiffs failed to timely file a complaint. Defendants did not proceed with demolition until the temporary restraining order was lifted. In this same context, Plaintiffs failed to perfect an appeal as to the administrative law judge's order. Plaintiffs had likewise previously failed to obtain an appropriate building permit to repair the partially destroyed former service station building.

Plaintiffs complain (Plaintiff's Final Argument, P. 6) that the blight proceeding deprived them of procedural due process rights. In the Court's conclusion, plaintiffs have waived their right to pursue those issues here by their failure to timely perfect their appeal. The *only* issues which are cognizable here relate to Defendant's conduct at Plaintiffs' property when the abatement procedures took place.

The Court finds and concludes from a review of the evidence and the administrative law judge's order that the "garage shop" building razed by the County was not covered by the order. The County has objected to the admission and consideration of the transcript of the administrative law hearing, but has presented no plausible reason for its exclusion. In a context such as the one here, where an order is susceptible of more than one interpretation, the Court can think of no item which can be of greater utility than the transcript, so that the Court can determine what was covered in testimony and what was requested by the County. Since Defendant Matteson was present, the transcript would best show what information was available to him and (through him) to Defendant County in interpreting the judge's order. The Transcript (Plaintiff's Exhibit R) is accordingly admitted and considered by the Court for all purposes. Without the transcript, a preponderance of the evidence tends to show that the garage shop located building toward the rear of the property and destroyed by the Defendants was *not* contemplated in the County's request or the Court's order: with the transcript added to the evidence, it is incontrovertible. See 10-20-89 hearing transcript. p. 19, l. 1-14; p. 23, l. 20-26; p. 49, l. 7-12; p. 33, l. 9 to p. 56, l. 16; p. 56, l. 23 to p. 57, l. 3.

There is obviously one point of ambiguity in the transcript, noted at p. 57, l. 13 & 14. The fact that the Court's language attempted to be selective, rather than all-inclusive, supports the above conclusion. The Court finds that the vague statement about "other buildings not in compliance with C-4 zoning," when viewed in the context of the detailed testimony about specific items and the Court's obvious intent to clean up confusions (p. 57, l. 15-18) means that this ambiguity lends little support to the County's position. The Court therefore finds and concludes that the destruction of this building was not authorized by the administrative law judge's order and that the County's actions constituted a taking for which Plaintiff Hibbard is legally entitled to be compensated.

The Court rejects Defendants' contention that Plaintiffs are foreclosed from compensation because they did not pursue an inverse condemnation claim. The actions in question do not fall within the ambit of the County's limited condemnation powers, and the property was not, and could not, have been taken for actual use by the County; nor was its use and ownership by Plaintiffs pre-empted for some public good. The property was simply out-and-out destroyed. Plaintiffs cannot be constrained, under these peculiar circumstances, to pursue inverse condemnation. *See also*, Judge Bookman's Order of 12-28-90.

Plaintiff Hibbard's other property at this location falls within the ambit of the order, with the exception of the below ground tank and pump facilities. Given the massive and pervasive nature of the blight, the Court finds and concludes that these items were damaged as an inevitable result of the permissible cleanup activities and methods, *which the Court finds to have been reasonable* in method and scope except as otherwise noted herein. The Court's further finding and conclusion is that the County cannot be held to an unreasonably high standard of care and that Defendants' acts as to the underground tank and pump equipment constituted neither a taking nor a deprivation of Plaintiffs' civil rights. The means employed by the County were reasonable, and the incidental damage to this equipment seems to the Court to have been unavoidable. The Court found Plaintiffs' testimony regarding the utility and value of the items (as with much of the Plaintiffs' testimony) to have been totally devoid of creditability. The Court concludes that Plaintiffs are not entitled to compensation for damage to this property.

As to Plaintiff Garrison, since his property was in the building improperly razed by the County, the Court finds and concludes that there was also a taking of his property and that he is entitled to compensation therefor. The Court finds Plaintiff Garrison's testimony as to the value of this property to be largely incredible and finds that the fair market value of this property was approximately $3,500.

Plaintiff Hibbard is entitled to be compensated for the taking of his garage building, which the Court finds to have a fair market value of $10,000.

As to Plaintiffs' claims under 42 USC 1983, it is the Court's finding that, as to Plaintiffs' garage shop building and contents, the actions of Defendants were a willful deprivation of Plaintiffs' civil rights in contravention of 42 USC 1983. The question of whether the administrative law judge's order authorized the destruction of this garage shop building was debatable, because of the ambiguities in the order; however, since the Court finds and concludes that Defendant Matteson knew the garage/shop building was not covered and so advised Defendant Loewe, Defendants' conduct was willful. It must be noted that all of the proceedings here had been contested, tempers had flared, and that the decision to proceed was made while the demolition crew was on-site and acting. For these reasons, and the others previously set forth, the Court finds and concludes that Defendants' acts have not been proven beyond a reasonable doubt to be of the egregious nature necessary to support a finding in favor of Plaintiffs as to exemplary damages; only that Plaintiffs have proved by a preponderance of the evidence that they were deprived of their civil rights without due process of law by Defendants who were acting willfully and under color of their official authority to the limited extent set forth above. Judgment will therefore enter in favor of Plaintiff Hibbard for $10,000, and for Plaintiff Garrison for $3,500, jointly and severally against Defendants Adams County, Loewe and Matteson. Plaintiffs have shown no different damages under 42 USC 1983 than those proven under a condemnation theory, and damages will be cumulated.

Attorneys fees issues are reserved for further ruling.

DATED at Brighton, Colorado on April 14, 1992.

BY THE COURT:

/s/ MICHAEL A. OBERMEYER
Michael A. Obermeyer
District Court Judge

CERTIFICATE OF MAILING

I certify that on April 14, 1992, copies of the foregoing Order were deposited in the United States Mails at Brighton, Colorado, postage prepaid, addressed to:

Darrell L. Campbell
1120 Lincoln Street, Ste. 1000
Denver, CO 80203

Gilbert Goldstein
1 DTC, Suite 1150
3251 DTC Parkway
Englewood, CO 80111

Thomas Merrigan
6755 East 72nd Avenue
Commerce City, CO 80022

/s/ MARY C. DELGADO
Mary C. Delgado
Clerk—Division A

No. 93CA0593

COLORADO COURT OF APPEALS

November 3, 1994

DEAN HIBBARD AND H.D. GARRISON,
Plaintiffs-Appellees and Cross-Appellants,

v.

COUNTY OF ADAMS, STATE OF COLORADO;
ROBERT J. LOEW; AND DARREL L. MATTESON,
Defendants-Appellants and Cross-Appellees.

APPEAL FROM THE DISTRICT COURT OF ADAMS COUNTY
HONORABLE MICHAEL A. OBERMEYER, JUDGE
HONORABLE CINDY H. BRUNER, JUDGE
NO. 89CV2876

Division I
Opinion by JUDGE CRISWELL
Metzger and Kapelke, JJ., concur

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND CAUSE REMANDED WITH DIRECTIONS

Gilbert Goldstein, Denver, Colorado; Darrel L. Campbell, Denver, Colorado, for Plaintiffs-Appellees and Cross-Appellants

Gehler & Merrigan, Thomas E. Merrigan, Paula B. Gerlach, Commerce City, Colorado, for Defendants-Appellants and Cross-Appellees

Defendants, County of Adams; Robert J. Loew, the county attorney; and his assistant, Darrel L. Matteson, appeal from the judgment of the trial court awarding damages and attorney fees under 42 U.S.C. §§ 1983 and 1988 (1982) to plaintiffs, Dean Hibbard and H.D. Garrison, for violation of their civil rights. Plaintiffs cross-appeal from the trial court's rejection of their claim that an ordinance of the County was invalid and from that court's award of damages and attorney fees. We affirm in part, reverse in part, vacate the award of fees, and remand the cause for further proceedings.

In 1988, the County adopted an ordinance (Ordinance No. 3) designed to eliminate "blighted areas" in the county. It contains two substantive provisions that are pertinent here.

First, Section III of Ordinance No. 3 provides, in part, that:

> The exteriors of all commercial establishments or multifamily buildings . . . shall be maintained so as to present a *neat and orderly appearance*. (emphasis supplied)

In addition, Section V provides that a commercial establishment or a multifamily building must be "kept free of junk, trash, rubbish, debris or refuse of any kind."

Failure of the owner of any property to comply with these requirements is declared to be a "cause of blight" and is subject to enforcement proceedings under the ordinance.

In the case of a violation of the ordinance, a notice is given to the owner of the property, and the property must be brought into compliance. If the offending materials are not removed, a hearing is held, and an Administrative Law Judge (ALJ) must make findings as to whether causes of blight exist; if the ALJ finds that such exist and should be removed, an administrative order is issued commanding the owner to remove the causes of the blight.

Plaintiff Hibbard owned real property within the county upon which were located two commercial buildings, one of which had been damaged by fire in 1983 and had not been repaired.

Plaintiff Garrison was living in the other building in which he maintained various items of personal property.

In 1989, the County, alleging that the property was being maintained in violation of Ordinance No. 3, gave notice to plaintiffs and a hearing was held before an ALJ, who issued a written decision finding that certain "blight factors" existed on the property, as follows:

> A. a building which is vacant and was the subject of a fire in 1983 which pursuant to Section III of Ordinance No. 3, County of Adams, is not a building that is being maintained so as to present a neat and orderly appearance . . .
>
> B. Pursuant to Section V, this Court finds that junk, loose trash, a semi-trailer, fence posts, barricades, tires, wood, bricks, cones, metal junk, piles of asphalt, acetylene tank, rusted containers, cinder blocks, trash, rusted trailers, an inoperable and unsightly van, an inoperable pickup truck, *old and unsightly out-buildings*, an old and rusted motor cart are all blighting factors on this particular property. (emphasis supplied)

The order also required all materials, "except the building referred to above," removed by a specified date and the "foregoing blighted building which was burned in the fire in 1983" to be removed a few days later. If plaintiffs did not comply with this order as directed, the County was authorized to enter upon the premises, to remove the items described, and to charge the costs of such removal as a lien against the property.

Plaintiffs failed to comply with the ALJ's order, and the County proceeded to "clean-up" the property. In doing so, it destroyed both the fire damaged building and the other building on the property. In addition, it removed and destroyed plaintiff Garrison's personal property inside the second building and damaged an underground tank, pump, and well that were on the property.

Plaintiffs then instituted this action, asserting several claims against the defendants. They sought a declaratory judgment that, to the extent that Ordinance No. 3 authorized the destruction of a building because it did not present a "neat and orderly" appearance, the same was invalid because not authorized by any Colorado statute and because it was unconstitutionally vague. In addition, they sought a joint and several judgment for damages against all defendants based upon the destruction of the second building and of the items of personalty within that building and for the damage to the underground tank, pump, and well.

The trial court upheld the validity of Ordinance No. 3. However, it determined that the ALJ's order did not authorize the destruction of the second building nor the removal of the personalty within it. It also found that the individual defendants knew that the ALJ's order did not apply to such items, but willfully ordered their destruction in violation of plaintiffs' constitutional rights. It entered a judgment for damages against all three defendants.

However, the court refused to grant any award for the damages caused to the tank, pump, and well because it determined that such damage was a necessary incident to the destruction and removal of the fire damaged building and the other items described in the ALJ's order, which were properly authorized to be destroyed or removed.

I. THE VALIDITY OF ORDINANCE NO. 3.

Plaintiffs argue that, to the extent that Ordinance No. 3 purports to authorize the destruction of any building through administrative proceedings, it is invalid because the County has not been authorized to adopt any such regulation. They also argue that, in any case, because the only standard for destruction is whether the building presents a "neat and orderly" appearance, the ordinance is unconstitutionally vague. Because we agree with-plaintiffs' first assertion, we need not reach their second.

In Colorado, a county possesses no inherent powers. Rather, it has only that "regulatory authority 'expressly conferred upon [it] by the constitution and statutes, and such incidental implied powers as are reasonably necessary to carry out such express powers.'" *Board of County Commissioners v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045, 1055 (Colo. 1992) (alteration in original) (quoting *Board of County Commissioners v. Love,* 172 Colo. 121, 470 P.2d 861 (1970)). It necessarily follows, therefore, that "a county ordinance or regulation exceeding the authority granted by the state is invalid." *Cimarron Corp. v. Board of County Commissioners,* 193 Colo. 164, 168, 563 P.2d 946, 949 (1977).

The question, therefore, is whether, at the time of the events giving rise to this litigation, any statute authorized a county to require the removal of a building because it is not "neat and orderly." We conclude that there existed no such statute.

Ordinance No. 3 itself recites that it was adopted pursuant to the authority granted to the County by § 30-15-401, et seq., C.R.S. (1994 Cum. Supp.). In addition, in oral argument before us, the County argued that the statute authorizing it to adopt a zoning resolution provided it with the requisite authority. We disagree.

At the time of the ordinance's adoption, what is now § 30-15-401(l)(a), C.R.S. (1994 Cum. Supp.), granted authority for a county to:

> compel the removal of *rubbish, including trash, junk, and garbage,* from lots and tracts of land within the county . . . (emphasis supplied)

It also authorized the County, upon notice and failure of the property owner to remove such items, to accomplish the removal and to assess the costs therefor against the property, to be collected as ad valorem taxes are collected.

This statute also authorizes a county to compel the removal of weeds and brush, but it requires application to a county or district court for the issuance of an administrative entry and seizure warrant in order for the county to remove the same. Section 30-15-401(l)(a)(I.5), C.R.S. (1994 Cum. Supp.).

This statute does not define the terms "rubbish," "trash," "junk," or "garbage," but nothing within the statute evidences an intent to have these items carry other than their ordinary meanings. And, such terms generally refer to worn or used items, waste having relatively little or no value, or refuse from food preparation. *See Webster's Third New International Dictionary* 935, 1227, 1983, and 2421 (1976).

In 1990, after the occurrence of the events relevant here, the General Assembly added § 30-15-401(l)(q), C.R.S. (1994 Cum. Supp.), which authorizes the removal of "any building or structure" presenting a substantial danger to the public health, safety, or welfare, or which is dilapidated and unused by the owner, or which is uninhabited because of deterioration or decay, if its condition constitutes a fire hazard or subjects the adjoining property to danger of damage by storm, soil erosion, or rodent infestation, or any building which becomes a place frequented by trespassers and transients seeking a temporary hideout or shelter.

That amendment is not applicable here. Nevertheless, the General Assembly's use of the term "building or structure" in the same statutory section under consideration is evidence that it did not intend for the general terms rubbish, trash, junk, or garbage to include buildings or structures.

We conclude, then, that, to the extent that Ordinance No. 3 contemplates the removal of junk, trash, garbage, and rubbish, as those terms are generally understood, the ordinance was authorized by the then existing provisions of § 30-15-401(l). However, to the extent that the ordinance purported to allow an ALJ to issue an order compelling the removal of any building or structure, it was not so authorized.

Further, we hold that "old or unsightly outbuildings" cannot, by those facts alone, be considered to be junk, trash, debris, or rubbish of any kind. Here, the ALJ made no determination that either building had become so deteriorated that it no longer constituted a "building" and had become merely junk, debris, or rubbish. The ALJ's order was based solely upon his finding that the fire-damaged building did not present a "neat and orderly" appearance.

Likewise, we conclude that none of the statutes authorizing a county to adopt zoning regulations, *see* § 30-28-111, et seq., C.R.S. (1986 Repl. Vol. 12A), provided support for this aspect of Ordinance No. 3.

Even if we assume that a county may, in the exercise of its zoning power, require the removal of buildings that are not maintained in a "neat and orderly" manner, the violation of a zoning regulation is to be enforced by the withholding of building permits, § 30-28-114, C.R.S. (1986 Repl. Vol. 12A), by criminal prosecution, § 30-28-124(l), or by an appropriate civil action in the district court, § 30-28-124(2), C.R.S. (1986 Repl. Vol. 12A). As defendants conceded during oral argument before us, the statutes authorizing the County to zone do not authorize it to destroy buildings not in conformance with a zoning requirement by means of a local administrative order.

We conclude, therefore, that, to the extent that Ordinance No. 3 purports to authorize the County to destroy and remove buildings that do not present a "neat and orderly" appearance, the same was unauthorized and invalid. That ordinance, therefore, could not provide any justification for the County's destruction of either of the buildings destroyed by its agents.

II. THE COUNTY'S LIABILITY UNDER § 1983.

42 U.S.C. §1983 authorizes the award of damages to any person who is deprived of any right, privilege, or immunity secured by the Constitution or laws by any "person" acting "under color of any statute, ordinance, regulation, custom, or

usage" of any state or local government. And, under this statute, a local government, such as the County, is a "person" subject to suit. *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Wigger v. McKee,* 809 P.2d 999 (Colo. App. 1990).

However, such an entity is not liable under the doctrine of respondeat superior. *Monell v. Department of Social Services, supra.* It is liable only to the extent that the deprivation of rights results from the implementation of a policy, whether formal or informal, adopted by the entity. *See Pembaur v. Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

A.

Ordinance No. 3 is an express, formal "policy" adopted by the County to require the removal or destruction of buildings not "neat and orderly." Hence, to the extent that the actions of the County's agents in destroying the two buildings were authorized by Ordinance No. 3, the County is liable for any damages resulting from that destruction. Such destruction, under the circumstances, would constitute a "taking" of plaintiffs' property without compensation and without due process of law. *See Srb v. Board of County Commissioners,* 43 Colo. App. 14, 601 P.2d 1082 (1979).

The ALJ's order, issued pursuant to Ordinance No. 3, authorized the destruction of the fire damaged building. And, plaintiffs seek no damages because of the County's destruction of this building itself. However, because Ordinance No. 3 provided no proper authority for such action, the County is liable for any damage to plaintiff's other property, such as the underground tank, pump, and well, if such damage resulted from the County's unauthorized action.

The trial court determined that destruction of the other building was not authorized by the ALJ's order. Yet, before us the County argues that it *was* so authorized. If so, that second building was also destroyed pursuant to Ordinance No. 3, and its destruction was wrongful. In such circumstances, the County would be liable for the destruction of this building to the same extent that it is liable for damages to plaintiff's other property, such as the underground tank, pump, and well, if such damage resulted from the County's unauthorized action.

We need not decide this issue, however. Rather, we conclude that, even if the ALJ's order did not authorize the destruction of the other building, the County is still liable for any resulting damages.

B.

An action of a local government's officer may be undertaken pursuant to a "policy" of a local government even though that policy is not reduced to a formal statement. Indeed, a local official may establish policy by his or her decision in a single instance, if he or she is, in fact, a "policy maker," *i.e.,* if he or she has the final word upon the subject. *Pembaur v. Cincinnati, supra. See also St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Givan v. Colorado Springs,* 876 P.2d 27 (Colo. App. 1993) (cert. granted).

Thus, in *Pembaur,* a county was held liable for the unlawful search of a physician's office when the sheriff requested the legal advice of the county attorney, and the county attorney advised the sheriff to proceed with the search. There, the county attorney's determination of the right of the county to search constituted the establishment of a "policy" of the county with respect to that particular transaction.

The county attorney in Colorado is a constitutional officer, appointed by the county commissioners. Colo. Const. art. XIV, § 8; §30-11-118, C.R.S. (1986 Repl. Vol. 12A). The duties and responsibilities of the office were described by our supreme court in *Medberry v. People,* 107 Colo. 15, 19, 108 P.2d 243, 245 (1940), as follows:

> Under the statutes of Colorado a county attorney is employed primarily as the legal advisor of the county commissioners in whose discretion reposes the power of appointment . . . *In certain matters he advises other county administrative officers,* appears for the county in cases involving dependent, neglected and delinquent children, in lunacy inquests and, when directed by the county commissioners, in civil litigation to which the county is a party or in which it is interested. (emphasis supplied)

Further, if, as defendants argue here, the adoption of Ordinance No. 3 was an exercise of the County's zoning authority, the county attorney is specifically invested, by statute, with the responsibility of enforcing its provisions. *See* § 30-28-124(2), C.R.S. (1986 Repl. Vol. 12A). Indeed, in asserting that their actions here were subject to an absolute immunity, the individual defendants affirmatively allege that one of the responsibilities of their offices is to enforce the provisions of Ordinance No. 3.

The two individual defendants were present on plaintiffs' property during the clean-up activities; they were, as the trial court found, the highest ranking county officials present. While there, the two individuals, one of whom was present representing the County throughout the previous administrative hearing, interpreted the ALJ's order as authorizing the destruction of the second building and so advised the county officials who were in charge of the clean-up operation.

With respect to the meaning and breadth of the ALJ's order, we are convinced that the interpretation placed upon it by the county attorney and his assistant constituted the adoption of an official county policy. Indeed, the County has specifically adopted that interpretation in these proceedings and has urged its correctness both in the trial court and before us. See *St. Louis v. Praprotnik, supra* (entity is liable for civil rights violation if it adopts policy of subordinate).

Given these circumstances, therefore, we conclude that the County is liable for any damages resulting to plaintiffs from the destruction of either building.

III. THE INDIVIDUALS' LIABILITY

Whether an individual public employee is a "policymaker," while important in determining the liability of a governmental unit under § 1983, is irrelevant in determining his or her own liability under that statute. This is so because, irrespective of the level of responsibility, a government official is personally liable under §1983 for an abuse of the power of office which results in the deprivation of a constitutional right. This does not mean, of course, that an act of simple negligence by an official will give rise to such liability. *Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

Here, the trial court determined, with record support, that, in light of the events at the hearing before the ALJ, it was "uncontrovertible" that the ALJ's order did not authorize the destruction of the second building and that the two individual defendants knew that its destruction was unauthorized. Nevertheless, the court found, the two individuals "willfully" interpreted the order as allowing destruction of the second building and so advised the other county employees at the scene. Hence, the court entered a judgment against the two individual defendants for the damages sustained as a result of the destruction of the second building and its contents.

The individual defendants assert that the trial court erred in several ways in entering this judgment against them. We disagree with each of their assertions.

A.

The two attorneys first assert that they were sued only in their "official" capacities.

However, in no place in any of the pleadings do plaintiffs describe the two defendants as being sued only in their official capacities. Rather, from the beginning, plaintiffs sought to recover damages against all defendants, personally, and on a joint and several basis. Such a claim can be asserted against these two defendants only in their personal capacities. *See Kentucky v. Graham,* 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).

The allegation in plaintiffs' complaint that the two individuals were acting, "not as individuals, but under the color and pretense of the ordinances of the County," was an allegation that the defendants were acting under color of law and not simply as individuals—a necessary condition to impose personal liability under § 1983. *See Screws v. United States,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) (an individual pursuing purely private ends without use of governmental authority does not act "under color of law").

Finally, because the County itself was subject to suit here, nothing was to be accomplished by suing the individuals only in their official capacities. *See Brandon v. Holt,* 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985); *Oten v. Colorado Board of Social Services,* 738 P.2d 37 (Colo. App. 1987) (official capacity suit is used when entity, such as the state, is itself not subject to suit under § 1983).

B.

The individual defendants also assert that the doctrine of prosecutorial immunity provides them an absolute immunity for their actions here.

In actions under § 1983, there exists an absolute immunity for persons exercising the prosecutorial function, *i.e.,* for those performing acts that are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman,* 424 U.S. 409, 430, 96 S.Ct. 984, 995, 47 L.Ed.2d 128, 143 (1976). However, in determining the existence of such immunity, a "functional" test is employed—the court must look "to the nature of the function performed, not the identity of the actor who performed it." *Buckley v. Fitzsimmons,* 509 U.S. ____, ____, 113 S.Ct. 2606, 2613, 125 L.Ed.2d 209, 223 (1993) (neither preindictment investigation activities nor post-indictment public statements are part of the prosecutorial function).

The giving of legal advice to law enforcement agents is not a part of the prosecutorial function because it is not intimately associated with the judicial process. *Burns v. Reed,* 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991); *Higgs v. District Court,* 713 P.2d 840 (Colo. 1985). *See also Awai v. Kotin*, 872 P.2d 1332 (Colo. App. 1993).

Here, the acts charged against the individuals consist of interpreting the ALJ's order and of providing legal advice to other county officials based upon that interpretation. Hence, they are not entitled to absolute immunity with respect to such acts.

C.

Every public official is entitled to assert a qualified immunity in a damage action under § 1983. Such an official is, therefore, not liable for his or her actions unless those actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982). And, to be "clearly established" for this purpose, the nature of the right must be sufficiently clear that a reasonable official would know that what he or she is doing violates that right. *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987); *Abouzari v. Foster*, 795 P.2d 1386 (Colo. App. 1990). The existence of a qualified immunity, therefore, will depend upon objective factors. *See Higgs v. District Court, supra.*

Here, then, the questions presented are whether the individuals' interpretation of the order as authorizing the destruction of the second building and its contents was objectively reasonable and, if not, whether they reasonably should have known that a county's destruction of private property under the circumstances would constitute a "taking" of plaintiffs' property without compensation or due process of law.

While the trial court did not specifically refer to this issue in passing upon the individual defendants' liability, that court specifically found that one of them knew that the order did not cover the second building and that he so informed the other individual. Consequently, the trial court, on supporting evidence, found that these two defendants acted "willfully" in destroying the second building.

Further, as attorneys for the County, the individual defendants were charged with the knowledge that a county's deliberate destruction of private property, if not lawfully authorized, constitutes a taking of property without compensation and without due process of law. *See Srb v. Board of County Commissioners, supra.*

Hence, the record supports the judgment entered against the individual defendants for the damages sustained by plaintiffs as a result of the destruction of the second building and its contents.

However, because the trial court considered the destruction of the fire damaged building to be proper, it did not consider the individuals' liability for any damage that might have resulted from its destruction. We conclude that they cannot be liable for any such damage because it was, at the time the ALJ issued his order and the individuals interpreted it, by no means "clearly established" that Ordinance No. 3 was partially invalid. On the contrary, the district court concluded that the County was authorized to adopt such an ordinance. Accordingly, the individuals enjoy a qualified immunity from liability for damages flowing from the ordinance's partial invalidity. *See Rappa v. New Castle County,* 18 F.3d 1043 (3rd Cir. 1994).

D.

The individuals finally assert that the trial court's consideration of the transcript of the hearing before the ALJ was error.

However, if an order is subject to some ambiguity, the record of the proceedings in which it was entered may be reviewed so as to interpret it. *See Hinderlider v. Canon Heights Irrigation & Reservoir Co.*, 117 Colo. 183, 189, 185 P.2d 325, 327 (1947) (when construction of a court decree is necessary, it must be construed "in light of the facts which gave it birth"); *Security Mutual Casualty Co. v. Century Casualty Co.*, 621 F.2d 1062 (10th Cir. 1980) (in construing ambiguous decree, court may examine entire record).

Moreover, the assistant county attorney here was present throughout the hearing before the ALJ, and his knowledge of those proceedings was relevant upon the question of the objective reasonableness of his actions.

Further, this transcript was not hearsay, as defendants contend. It was offered to demonstrate the nature of the evidence upon which the ALJ relied in entering his order, not for the truth of any testimony. Even if it was hearsay, it was admissible as a business record of a public agency. *See* CRE 803(6) and (8); *Kriegel v. Industrial Commission*, 702 P.2d 290 (Colo. App. 1985).

The trial court, therefore, committed no error in considering the transcript of the hearing before the ALJ.

IV. Damages

A.

Plaintiffs assert that the court erred in determining the amount of actual damages sustained by them. While we disagree that the court's award was erroneous, we do agree that, in light of our conclusion that Ordinance No. 3 is partially invalid, the cause must be remanded to the trial court for its further consideration.

Generally, the measure of damages to be applied in a §1983 action is to be determined from the principles developed from the common law of torts. *Memphis Community School District v. Stachura,* 477 U.S. 299, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986).

Because defendants' actions here resulted in the deprivation of plaintiffs' real and personal property, these actions were similar to a conversion of the property or to its "taking" through the exercise of the power of eminent domain. In either case, the measure of damages would be the same, *i.e.*, the fair market value of the property at the time. of the taking, any damage caused to the remaining property, and pre-trial interest from the date of the taking to the date of judgment. *See Culpepper v. Pearl Street Building, Inc.*, 877 P.2d 877 (Colo. 1994) (conversion); *Herring v. Platte River Power Authority,* 728 P.2d 709 (Colo. 1986) (inverse condemnation).

This was the measure of damages applied by the trial court. And, although the amount of damages awarded by that court was not supported by any specific testimony, that amount was within the range of values established by the evidence and was, therefore, properly supported. *See Town of Red Cliff v. Reider,* 851 P.2d 282 (Colo. App. 1993).

However, the trial court refused to enter any award for the damage to the underground tank, pump, and well, finding that the damages to these items occurred during the clean-up and removal of the items that were authorized to be removed by the ALJ's order. It is not possible to determine from the trial court's findings whether the damage to these items occurred during the destruction and removal of the fire-damaged building or during the course of the removal of the various items of personal property.

If the damage occurred as a result of destruction and removal of the fire damaged building, that damage would be compensable because it would have occurred during the course of an illegal action. Likewise, the same might be true if the damage occurred as a result of the County's removal of weeds and brush. *See* § 30-15-401(l)(a)(I.5). Hence, we must remand the cause to the trial court for it to determine the amount of damages, if any, sustained by plaintiffs in the course of the destruction and removal of the fire damaged building. If such damage occurred, only the County and not the individual defendants would be liable therefor.

B.

The parties agree that punitive damages cannot be assessed against the County. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). They may be awarded against the individuals, however, if their actions demonstrate reckless or callous disregard of, or indifference to, the rights or safety of others. *Smith v. Wade,* 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). Nevertheless, an award of punitive damages lies within the discretion of the fact finder; they "are *never* awarded as of right, no matter how egregious the defendant's conduct." *Smith v. Wade,* 461 U.S. at 52, 103 S.Ct. at 1638, 75 L.Ed.2d at 648-49 (emphasis supplied).

Here, the trial court determined that, because plaintiffs refused to cooperate with the County in attempting to remove items of personal property and assumed an adversarial position that resulted in a flaring of tempers, the defendants' conduct was not so egregious, given the circumstances, as to merit an award of exemplary damages. We cannot say that the trial court abused its discretion in reaching this determination.

V. Attorney fees.

42 U.S.C. § 1988 (1982) authorizes an award of attorney fees to the "prevailing party" in an action under § 1983. In order to be considered a prevailing party under this statute, all that is required is that the plaintiff succeed upon a significant issue presented by the litigation and achieve some of the benefits sought in the lawsuit (whether the same is achieved through adjudication or settlement). *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). *See International Society for Krishna Consciousness, Inc. v. Colorado State Fair & Industrial Exposition Commission,* 673 P.2d 368 (Colo. 1983) (recognizing rule); *Overland Development Co. v. Marston Slopes Development Co.,* 773 P.2d 1112 (Colo. App. 1989) (applying same rule to award of fees under private contract).

If a plaintiff "prevails" under the *Hensley* standard, that plaintiff is entitled to an award of fees, absent some special circumstances which would render such an award unjust. *Smith v. Robinson,* 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984).

Under the *Hensley* standard, plaintiffs were the prevailing parties. Hence, they are entitled to an award of fees under § 1988 for the prosecution of their claims.

Defendants assert, however, that plaintiffs cannot be awarded fees here because an award of fees can only be made if the client is legally obligated to pay fees. They conclude, then, that, because counsel represented plaintiffs under an oral contingency fee arrangement, which was not reduced to writing as required by C.R.C.P. ch. 23.3, Rule 4, fees cannot be awarded. We reject this assertion.

Under C.R.C.P. ch. 23.3, Rule 7, a contingency fee agreement is one under which the fee payable is based upon a "certain *agreed percentage or amount* that is payable only upon attaining a recovery, *regardless of the time* and effort involved." (emphasis supplied)

Here, it was stipulated that plaintiffs and their counsel initially agreed that counsel would be paid at an hourly rate. As the litigation continued, however, it became apparent that plaintiffs would be unable to pay those fees. Counsel nevertheless continued their representation in anticipation that an award of fees would be made under § 1988, and if not, counsel was to treat the cause as a *pro bono* effort.

Such an agreement is, by definition, not a contingent fee agreement under the rule and, therefore, need not be in writing.

Further, we reject defendants' argument that an award of attorney fees cannot be made under § 1988 unless there is an obligation on behalf of the plaintiff to pay fees.

Section 1988 calls for the award of "reasonable" fees. Their reasonableness is to be determined, based upon a consideration of the market value in the community of the services rendered.

Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) (award of fees mandated even though plaintiff represented by charitable organization); *Oten v. Colorado Board of Social Services, supra* (fee award of nearly $43,000 approved although plaintiffs were represented by Legal Aid Society). Hence, in determining a reasonable fee to be awarded to plaintiff, "[t]he trial judge should not be limited by the contractual fee agreement between plaintiff and counsel." *Blanchard v. Bergeron,* 489 U.S. 87, 96, 109 S.Ct. 939, 946, 103 L.Ed.2d 67, 77 (1989).

The fact that plaintiff here did not incur a specific obligation for the payment of fees to their counsel, therefore, does not prevent an award under § 1988.

We agree with plaintiffs, however, that the trial court here did not properly calculate the amount of fees to be awarded.

As was explained in *Oten v. Colorado Board of Social Services, supra,* there exists a required method for calculating attorney fees under § 1988. The court must first consider the number of hours that reasonably should have been expended by counsel and the reasonable hourly rates for the services rendered that would be charged by private lawyers in the community. Once a basic amount is calculated by considering these two factors (the "lodestar" amount), that basic amount may be adjusted, either upwards or downwards, by considering the nature of the services rendered, the degree of success achieved, and other pertinent factors. *See Spensieri v. Farmers Alliance Mutual Insurance Co.,* 804 P.2d 268 (Colo. App. 1990). However, the "lodestar" amount is presumptively the reasonable fee to be awarded. *See Blanchard v. Bergeron, supra.*

Here, counsel for plaintiffs presented an affidavit listing the actual hours expended by them, the hourly rates deemed appropriate, and a description of the services rendered. Such affidavit supported a requested fee of some $86,000.

In addition, both plaintiffs and defendants presented expert opinions with respect to the question of a reasonable fee. While these opinions varied widely, all the experts nevertheless expressed their views by using a "lodestar" approach.

The court, however, did not engage in any lodestar calculation and, indeed, seems to have expressly rejected that approach. Rather, after hearing the expert testimony, it simply awarded a gross sum of $30,000 without specifying how it arrived at that figure except to refer to several factors which it took into consideration and to adopt a figure which it characterized as being about in the "middle" of the amounts suggested by the expert testimony.

This failure to use the lodestar method of ascertaining fees was error. Further, by failing to use the lodestar method and by failing otherwise to detail its analysis of the basis for its award, the trial court failed to provide this court with the means for reviewing the award's propriety.

We express no opinion whether the amount awarded by the court was proper. We must, however, remand the attorney fee issue to the trial court for its reconsideration under the proper standard.

The present judgments against defendants for actual damages are affirmed, but the decree determining that Ordinance No. 3 is valid is reversed. The trial court's judgment awarding attorney fees is vacated, and the cause is remanded to the trial court for its determination, based on the present record, whether plaintiffs are entitled to an additional award of damages that may have occurred during the destruction of the fire damaged building and for its entry of an award of attorney fees for services rendered to plaintiffs, all in accordance with the views expressed in this opinion.

JUDGE METZGER and JUDGE KAPELKE concur.

SUPREME COURT, STATE OF COLORADO
No. 94SC757 June 17, 1996

COUNTY OF ADAMS, STATE OF COLORADO;
ROBERT J. LOEW and DARREL L. MATTESON, *Petitioners,*

v.

DEAN HIBBARD and H.D. GARRISON, *Respondents.*

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT AFFIRMED IN PART AND
REVERSED IN PART, AND CASE
REMANDED WITH DIRECTIONS

Hall & Evans, L.L.C.
Alan Epstein
David R. Brougham
Josh A. Marks
Denver, Colorado
Attorneys for Petitioners

Gilbert Goldstein
Denver, Colorado
Darrel L. Campbell
Englewood, Colorado
Attorneys for Respondents

JUSTICE SCOTT delivered the Opinion of the Court.
JUSTICE MULLARKEY concurs in part and dissents in part, and
JUSTICE KOURLIS joins in the partial concurrence and dissent.

The Supreme Court in *Monroe v. Pape,* 365 U.S. 167, 187 (1961), held that 42 U.S.C. § 1983 (1988) must be "read against the background . . . that makes a [person] responsible for the natural consequences of his (or her] actions." Today, thirty years hence, we must decide whether a county or county officials may be held accountable under § 1983 for conduct that is designed to cause the outright destruction of a citizen's property. On the record before us, we conclude that the intentional misconduct of county officials causing the destruction of private property is a species of tort within the reach of § 1983 and we hold that government officials may be held personally accountable for their unauthorized and deliberate misbehavior under that Congressional enactment.

We granted certiorari to review *Hibbard v. County of Adams,* 900 P.2d 1254 (Colo. App. 1994).[1] Petitioners County of Adams (County), Robert J. Loew, and Darrel L. Matteson (individual defendants)[2] seek reversal of the court of appeals' judgment affirming the trial court's entry of judgment imposing liability under 42 U.S.C. § 1983 (1988) for damage to respondents Hibbard's and Garrison's (plaintiffs) real and personal property. We affirm in part, reverse in part, and remand to the court of appeals with directions that it return this case to the trial court for further proceedings consistent with this opinion.

I

Facts

In 1988, the County adopted Ordinance No. 3 to eliminate "blighted areas" in the County. Section III of Ordinance No. 3 provides that "[t]he exteriors of all commercial establishments or multifamily buildings . shall be maintained so as to present a neat and orderly appearance." Section V states that a commercial establishment or multifamily building must be "kept free of junk, trash, rubbish, debris or refuse of any kind." If the owner of any property fails to comply with these requirements, the property is declared a "cause of blight," and the owner is subject to enforcement proceedings under the ordinance.

---

[1] Our order granting certiorari set forth only two issues on review:

I. Whether the court of appeals erred in holding the County liable for destruction of property under 42 U.S.C. § 1983.

II. Whether the court of appeals erred in holding the County attorneys liable for destruction of property under 42 U.S.C. § 1983.

[2] Petitioners are collectively referred to as "defendants."

If the ordinance is violated, notice is given to the owner that the subject property must be brought into compliance. If the offending property is not brought into compliance, a hearing is held, and an Administrative Law Judge (ALJ) must make findings as to whether causes of blight exist. If the ALJ finds that causes of blight exist and should be corrected, an administrative order is issued commanding the owner to remove the causes of blight.

Plaintiff Hibbard owned real property within the County. Two buildings were located on the property, one of which was a commercial building damaged by fire in 1983 and had not been repaired (fire damaged building). Plaintiff Garrison worked and lived in the other building (Garrison's residence), which contained various items of personal property belonging to Garrison. In 1989, the County, alleging that the property violated ordinance No. 3, gave notice to plaintiffs and a hearing was held before an ALJ. In a written decision, the ALJ found that the following "blight factors" existed on the property:

> A. [A] building which is vacant and was the subject of a fire in 1983 which pursuant to Section III of Ordinance No. 3, County of Adams, is not a building that is being maintained so as to present a neat and orderly appearance . . . .
>
> B. Pursuant to Section V, this Court finds that junk, loose trash, a semi-trailer, fence posts, barricades, tires, wood, bricks, cones, metal junk, piles of asphalt, acetylene tank, rusted containers, cinder blocks, trash, rusted trailers, an inoperable and unsightly van, an

> inoperable pickup truck, old and unsightly out-buildings, an old and rusted motor cart are all blighting factors on this particular property.

The ALJ's order required plaintiffs to correct the "blight factors" by a specified date and directed that the fire damaged building was to be disposed of a few days later. If plaintiffs did not comply with the order, the County was authorized to enter the premises, remove the items described, and charge the costs as a lien against the property.

Plaintiffs failed to comply with the ALJ's order, and the County proceeded against plaintiffs' property. While clearing the property, the County razed the fire damaged building set forth in the order and, although they knew Garrison's residence was not covered by the ALJ's order, defendants Loew and Matteson intentionally and deliberately directed the destruction of Garrison's residence and the property Garrison stored in that building.[3]

Plaintiffs filed this action, asserting several claims against defendants. They sought a declaratory judgment that Ordinance No. 3 was not authorized by any Colorado statute and was unconstitutionally vague. Plaintiffs also sought a joint and several judgment for damages against all defendants based on the destruction of Garrison's residence, the items of personalty stored within that building, and the damage to an underground tank, pump, and well.

The trial court upheld the validity of Ordinance No. 3, but determined that the ALJ's order did not authorize the destruction of Garrison's residence and the personalty stored within it. The trial court also found that the individual defendants knew the ALJ's order did not apply to Garrison's residence but willfully ordered its destruction in violation of plaintiffs' constitutional rights.

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[3] As recognized by the court of appeals, zoning violations are more properly enforced by the withholding of building permits, criminal prosecution, or an appropriate civil action in district court. *See* § 30-28-114, 12A C.R.S. (1986); § 30-28-124(1), 12A C.R.S. (1986); § 30-28-124(2), 12A C.R.S. (1986); *Hibbard*, 900 P.2d at 1260.

The trial court entered a judgment for damages in favor of plaintiff Hibbard for $10,000, for plaintiff Garrison for $3,500, and jointly and severally against all defendants. However, it refused to award any damages for razing of the fire damaged building and the harm caused to the tank, pump, and well. The trial court determined that the damage to these objects was a necessary incident to the destruction of the fire damaged building described in the ALJ's order, which the court concluded was properly authorized to be removed.

The court of appeals affirmed in part, reversed in part, and remanded the case for further proceedings. *Hibbard,* 900 P.2d at 1258. The court of appeals stated "that, to the extent that Ordinance No. 3 purports to authorize the County to destroy and remove buildings that do not present a 'neat and orderly' appearance, the same was unauthorized and invalid." *Id.* at 1260.[4] Therefore, the court of appeals reasoned that the County could not rely upon the ordinance as authority for destruction of either building. *Id.*

The court of appeals found that Ordinance No. 3 was an express "policy" of the County and thus, the County was liable for destruction of the two buildings. *Id.* at 1261. Although the plaintiffs sought no damages for the fire damaged building, the court of appeals held the County liable for harm done to other property, such as the underground tank, pump, and well "if such damage resulted from the County's unauthorized action." *Id.* Regarding Garrison's residence, the court of appeals held that the county was liable for damages resulting to it because the unauthorized acts of defendants Loew and Matteson, the county attorney and his assistant, arose out of their interpretation of the

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[4] Because the court of appeals found the ordinance invalid, it did not address plaintiff's contention that the ordinance was unconstitutionally vague.

ALJ's order which, in effect, "constituted the adoption of an official county policy." *Id.* at 1262.

The individual defendants maintained that the trial court erred by entering judgment against them for damages sustained due to the destruction of Garrison's residence and its contents. The court of appeals disagreed. *Id.* It rejected the individual defendants' contentions that they were sued only in their official capacities and were entitled to qualified immunity. *Id.* at 1262-64. However, the court of appeals held that the individual defendants could not be liable for damage done to the fire damaged building "because it was, at the time the ALJ issued his order and the individuals interpreted it, by no means 'clearly established' that Ordinance No. 3 was partially invalid." *Id.* at 1264. Therefore, the individual defendants were entitled to qualified immunity for damages stemming from the ordinance's partial invalidity. *Id.* Finally, because it concluded that Ordinance No. 3 was partially invalid, the court of appeals remanded the case to the trial court for further consideration of damages.

II

Threshold Matters

Before addressing liability under 42 U.S.C. § 1983, we first examine two threshold matters: 1) whether the two individual defendants were sued only in their "official" capacities; and 2) whether the trial court lacked subject matter jurisdiction to address plaintiffs' § 1983 claim because of ripeness considerations. The individual defendants maintain that they were not sued in their individual capacities. We do not agree. Defendants also contend that the § 1983 claim was premature because plaintiffs failed to seek compensation from the county through state remedies, such as inverse condemnation, a direct taking claim under the Colorado Constitution, or a trespass action. This we address briefly below.

A

The individual defendants rely on paragraph five of plaintiffs' second amended complaint for their allegations that they were sued only in their official capacities:

> Defendant Robert J. Lowe [sic] is the County Attorney for the County of Adams, State of Colorado. Defendant Darrel L. Matteson is an Assistant County Attorney employed by the Adams County Attorney. Each and all *acts of Defendants Lowe and Matteson* set forth herein were done by them, *not as individuals, but under the color and pretense of the ordinances of the County of Adams, State of Colorado.*

(Emphasis added.) The individual defendants also note they were not personally served.

However, in their second amended complaint, plaintiffs specifically sought damages against all defendants on a joint and several basis. Also, the emphasized portion of the complaint serves only to make the required allegation for a § 1983 claim that the defendants were acting under color of law. See *Screws v. United States,* 325 U.S. 91, 108 (1945).

When a complaint does not clearly specify whether officials are sued personally, in their official capacity, or both, " '[t]he course of proceedings' " usually establishes the liability sought to be imposed. *Kentucky v. Graham,* 473 U.S. 159, 167 n.14 (1985) (quoting *Brandon v. Holt,* 469 U.S. 464, 469 (1985)). Throughout the proceedings, the individual defendants acknowledged the suit by affirmatively denying personal liability. *See, e.g.*, Answer to Second Am. Compl. Sixth Affirmative Defense ("Defendants Loew and Matteson in their individual capacities are entitled to official immunity and qualified good faith immunity."); Brief In Support of Mot. for Summ. J. and J. On the Pleadings, Vol. 1, at 237 ("Loew and Matteson are public officials, the County Attorney and Assistant County Attorney who are named as individual defendants in this case."). Significantly, the individual defendants did not seek dismissal because of plaintiffs' failure to allege individual liability. Rather, they sought dismissal based on personal immunity from suit. Also, by attacking the substantive claims raised by the plaintiffs, the individual defendants waived their objection to personal service and subjected themselves to the court's jurisdiction. *See Brown v. Amen,* 147 Colo. 468, 472, 364 P.2d 735, 737 (1961).[5]

Defendants maintain that the plaintiffs' § 1983 claim was not ripe. However, we denied certiorari on the ripeness issue. Then, after plaintiffs filed a motion for clarification of issues presented for certiorari review, we specifically stated that "[t]he court did not grant certiorari review on whether the § 1983 claim was ripe." Therefore, we decline a third invitation to address defendants' contention that plaintiffs' § 1983 claims are not ripe.

III

County Liability

In relevant part, 42 U.S.C. § 1983 (1988) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of The United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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[5] In Kentucky, the Court stated that "[t]here is no longer a need to bring official-capacity actions against local government officials, for under *Monell [v. New York City Dep't of Social Servs.,* 436 U.S. 658 (1978)], . . . local government units can be sued directly for damages and injunctive or declaratory relief." *Kentucky,* 473 U.S. at 167 n.14.

We begin with the proposition that "Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 690 (1978). Under § 1983, a municipality can be sued directly where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.*; *see also City of St. Louis v. Praprotnik*, 485 U.S. 112, 128 (1988) (plurality opinion) ("The city cannot be held liable under § 1983 unless respondent proved the existence of an unconstitutional municipal policy.").

A

As acknowledged by the defendants, "[i]n this case, the Board of County Commissioners is the policy maker and, as such, it created a policy through the enactment of Ordinance No. 3." Petitioner's Opening Brief at 13; *see also* Petitioner's Reply Brief at 4 ("[T]he (Colorado] Court of Appeals properly concluded that Ordinance No. 3 was a 'policy' for purposes of municipal liability under 42 U.S.C. § 1983 . . . .").

The court of appeals concluded that Ordinance No. 3 was invalid because the County was not authorized to adopt such a regulation.[6] *Hibbard*, 900 P.2d at 1259. Because the ordinance was unauthorized under state law,[7] the court of appeals did not address plaintiffs' contention that the ordinance was unconstitutionally vague. *Id.* However, it still held the County liable "to the extent that the actions of the County's agents in destroying the two buildings were authorized by Ordinance No. 3. . . . " *Id.* at 1261.

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[6] We did not grant certiorari to review the validity of Ordinance No. 3, so the court of appeals conclusion is not before us. The court of appeals noted that the statute it relied upon was amended in 1990. *See Hibbard*, 900 P.2d at 1260.

[7] We note that the ordinance's invalidity pursuant to state law does not by itself establish municipal liability under § 1983. *See Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992).

Under § 1983, a plaintiff must prove that "(1) a person (2) acting under color of state law (3) subjected the plaintiff or caused the plaintiff to be subjected (4) to the deprivation of a right secured by the Constitution or the laws of the United States." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 829 (1985) (Brennan, J., concurring). Under *Monell*, the County is a "person" for purposes of § 1983. Also, by adopting Ordinance No. 3, the County was acting "under color of law." *See id.* At the destruction site, the two individual defendants also acted "under color of law" by taking action pursuant to Ordinance No. 3, even though the individual defendants' actions were unauthorized.[8] Plaintiffs satisfy the first part of the causation element by establishing the existence of a municipal policy, embodied in Ordinance No. 3. *See id.* But plaintiffs must also establish that the County's actions caused "the deprivation of a right secured by the Constitution or laws of the United States." *Id.*

In the present case, there is no evidence that plaintiffs incurred any harm as a direct result of County policy. Plaintiffs sought no damages for the destruction of the fire damaged building itself. *Hibbard*, 900 P.2d at 1261. Regarding the utility and value of the underground tank, pump, and well, the trial court found plaintiffs' testimony (like much of plaintiffs' testimony) "to have been totally devoid of credibility."[9] Based upon the record before us, the County did not cause any damage giving rise to the deprivation of a federal right.

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[8] Acting "under color of law" alone, however, does not create municipal liability under § 1983 . . The plaintiffs must show that the illegal action was caused by the County, not a nonpolicymaking municipal employee. *See Tuttle*, 471 U.S. at, 829 (Brennan, J., concurring). A plaintiff meets this burden by establishing the existence of a municipal policy. *Id.* In the present case, County liability does not attach based upon the actions of the individual defendants because they were not policymakers. *See infra* part IIIB.

[9] The trial court also found any damage to the underground pump, tank, and well to have been "incidental." *See, e.g., City of Northglenn v. Grynberg*, 846 P.2d 175, 179 (Colo. 1993) ("In no case has mere depreciation in value been grounds to award just compensation for a damaging of property.").

Ordinance No. 3 did not articulate a building destruction policy subject to the discretion of the county attorney and his assistant. Therefore, the County is not liable for damage done to Garrison's residence and its contents. Damage to Garrison's residence resulted from the unilateral acts taken by the individual defendants, not a particular action taken by the County. *See id.* County policy or custom did not cause any damage in the present case.

B

While Ordinance No. 3 represents County policy, the court of appeals also premised County liability on the two individual defendants' behavior at the destruction site. Concluding the two individual defendants were policymakers, the court of appeals stated that "[w]ith respect to the meaning and breadth of the ALJ's order, we are convinced that the interpretation placed upon it by the county attorney and his assistant [the two individual defendants) constituted the adoption of an official county policy." *Hibbard*, 900 P.2d at 1262. We disagree. The two individual defendants were not policymakers for purposes of municipal liability under § 1983.

Congress intended municipal liability only when actions taken "pursuant to official municipal policy of some nature caused a constitutional tort." *Monell*, 436 U.S. at 691. In particular, a local government cannot be liable under § 1983 "solely because it employs a tortfeasor. . . . *Id.* Under § 1983, municipal liability cannot attach on a respondeat superior theory. *Id.* The Court stated:

> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may

> fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694.

Under *Monell*, municipalities may only be held liable for actions taken pursuant to a "custom" or "policy." *Tuttle*, 471 U.S. at 818 (plurality opinion) ("[T]he *Monell* Court held that only deprivations visited pursuant to municipal 'custom' or 'policy' could lead to municipal liability."). The "policy" requirement was "intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986). To recover from a municipality, a plaintiff must establish that the municipality has "officially sanctioned or ordered" an act. *Id.* at 480. Under this rationale, municipal liability may attach for a single decision by policy makers under certain circumstances. *Id.*[10]

However, a municipality is liable "only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Id.* at 481 (plurality opinion). The mere existence of an official's discretion does not "give rise to municipal liability based on an exercise of that discretion." *Id.*

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[10] Policy acts or edicts may not necessarily involve written rules intended to be applied consistently over time. *See id.* at 480-81. A local government "frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations." *Id.* at 481. In *Pembaur*, the Court explained:

> If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

at 482 (plurality opinion); *see also Praprotnik*, 485 U.S. at 126 (plurality opinion) ("If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability."). Before municipal liability attaches, a state official "must also be responsible for establishing final government policy. . . . " *Pembaur,* 475 at 483 (plurality opinion).[11]

A determination of whether an official constitutes a policymaker is a matter of state law. *Praprotnik,* 485 U.S. at 124 (plurality opinion); *Pembaur,* 475 U.S. at 483 (plurality opinion). In *Pembaur,* the plurality noted "that municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur,* 475 U.S. at 483-84 (plurality opinion); *see also Tuttle,* 471 U.S. at 823 (plurality opinion) ("'[P]olicy") generally implies a course of action consciously chosen among various alternatives . . . . ").

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[11] The plurality offered the following illustrative hypothetical:

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability.

Pembaur, 475 U.S. at 483 n.12 (plurality opinion).

The Board of County Commissioners articulates zoning policy for each county. *See, e.g.*, § 30-28-113(1), 12A C.R.S. (1986) ("[B]oard of county commissioners . . . may regulate . . . the location, height, bulk, and size of buildings and other structures, the percentage of lot which may be occupied, the size of yards, courts, and other open spaces, the uses of buildings . . . . "). The county attorney only enforces that policy. The county attorney's exercise of discretion in interpreting the ALJ's order reflects, without more, only a departure from policy. *See Praprotnik*, 485 U.S. at 127 (plurality opinion) ("When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality."). Because the Board possesses the authority to make final policy regarding zoning matters, it retains the authority to make municipal policy in that area. *See id.*

The court of appeals relied on *Medberry v. People*, 107 Colo. 15, 108 P.2d 243 (1940), for its conclusion that the county attorney and his assistant were policymakers. In *Medberry*, we described the duties and responsibilities of a county attorney in Colorado:

> Under the statutes of Colorado a county attorney is employed primarily as the legal advisor of the county commissioners in whose discretion reposes the power of appointment. In certain matters he advises other county administrative officers, appears for the county in cases involving dependent, neglected and delinquent children, in lunacy inquests and, when directed by the county commissioners, in civil litigation to which the county is a party or in which it is interested.

Id. at 19, 108 P.2d at 245 (citation omitted). However, a county attorney's duty to generally "advise other county administrative officers" does not by itself create policymaking authority in the specific area of zoning. To be a policymaker, the governmental official or officials must be "responsible for establishing final policy *with respect to the subject matter in question." Pembaur,* 475 U.S. at 483-84 (plurality opinion).

Unlike *Pembaur,* the county attorney and his assistant do not make final policy "with respect to the subject matter in question." In *Pembaur,* a physician refused entry to his clinic by Hamilton County Deputy Sheriffs and Cincinnati police, who were attempting to issue capiases for the arrest and detention of two of his employees. *Id.* at 472-73. After access was denied, the Deputy Sheriffs called their supervisor for further instructions. *Id.* The supervisor told the Deputy Sheriffs to contact the Assistant Prosecutor. *Id.* at 473. They did, and the Assistant Prosecutor conferred with the County Prosecutor, who gave instructions to "go in and get [the witnesses]." *Id.* The Court concluded that "[i]n ordering the Deputy Sheriffs to enter petitioner's clinic the County Prosecutor was acting as the final decisionmaker for the county, and the county may therefore be held liable under § 1983." Id. at 485. In *Pembaur,* the Court found under Ohio law that the Prosecutor "could establish county policy under appropriate circumstances . . . . " *Id.* at 484. The County Prosecutor did not merely render "legal advice." *Id.* The County Prosecutor possessed final authority to instruct the officers to enter the premises. In the present case, the county attorney was not imbued with any authority under the ordinance, rather, his authorized acts were limited to implementing the policy of Ordinance No. 3 as set by the Board of County Commissioners. As a matter of state law, the Board possessed final policymaking authority in the area of zoning.[12]

Because the two individual defendants were not policymakers, County liability does not attach for destruction of the contents of Garrison's residence due to the county attorney's and his assistant's actions at the destruction site.

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[12] The two individual defendants' subjective views are irrelevant. Policymaker status must be determined objectively by reference to state law.

IV

Individual Liability

As public officials, the two individual defendants claim they are entitled to qualified immunity. We agree in part and disagree in part. Two kinds of immunity defenses exist. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Absolute immunity is available only "[f]or officials whose special functions or constitutional status requires complete protection from suit . . . " *Id.*; *see also Higgs v. District Court*, 713 P.2d 840, 852 (Colo. 1985). Qualified immunity, on the other hand, represents the norm for executive officials. *Harlow*, 457 U.S. at 807; *Higgs*, 713 P.2d at 852. "Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official." *Harlow*, 457 U.S. at 815. In *Harlow*, the Court stated "that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818; *see also Higgs*, 713 P.2d at 852. The qualified immunity defense should fail if the law was clearly established because "a reasonably competent public official should know the law governing his [or her] conduct." *Harlow*, 457 U.S. at 819. An objective test for qualified immunity balances the competing interests of citizen rights and independent exercise of official authority. *Higgs*, 713 P.2d at 852. In Harlow, the Court observed:

> By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he [or she] should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of

> action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

Harlow, 457 U.S. at 819 (footnotes omitted); *Higgs*, 713 P.2d at 852 (quoting *Harlow*, 457 U.S. at 819).

The individual defendants are not entitled to qualified immunity for the destruction of Garrison's residence or his personal property. Regarding that building and its contents, the trial court found that "the actions of the Defendants were a willful deprivation of Plaintiffs' civil rights in contravention of 42 U.S.C. [§] 1983." *See also Crouse v. City of Colo. Springs*, 766 P.2d 655, 660 (Colo. 1988) ("The due process clause of the fourteenth amendment protects individuals from deprivation of liberty by deliberate abusive or harsh conduct by state officials.").

In its Order and Judgment dated April 14, 1992, the trial court found that "Defendant Matteson *knew* the garage/shop building [Garrison's residence] was not covered and so advised Defendant Loewe [sic] . . . ." (Emphasis added.) A reasonable public official would be expected to know that razing a private building and its contents out of personal convenience violated constitutional protections. *See id.* ("(O]utrageous abuse of government authority directed against citizens is precisely the type of misconduct which the remedies created by Congress in § 1983 were designed to deter."). Clearly established law should have made the individual defendants hesitate before destroying property not covered by the ALJ's order. A reasonable public official would have hesitated before destroying private property. The individual defendants improperly razed a building under the belief that a lawsuit would be "cheaper" than according plaintiffs the benefit of the process contemplated under Ordinance No. 3.

The trial court stated:

> (I]t is the Court's finding that, as to Plaintiffs' garage/shop building (Garrison's residence] and contents, the actions of Defendant were a willful deprivation of Plaintiffs' civil rights in contravention of 42 U.S.C. [§]1983 . . . . Plaintiffs have proved by a preponderance of the evidence that they were deprived of their civil rights without due process of law by Defendants who were acting willfully and under color of their official authority to the limited extent set forth above.

We agree. Conduct of public officials that results in the intentional and knowing destruction of private property should be repudiated and subjected to the same reproach we would apply to similar conduct by any other person. A public official who knowingly and capriciously acts outside the authority of government to deprive a citizen of property rightfully that of the citizen should not be able to escape liability by donning the cloak of government action as an aid to his or her defense. Because the individual defendants knowingly and intentionally acted outside their authority under the ALJ order and deliberately deprived plaintiffs of their procedural and substantive due process rights by causing the arbitrary destruction of their private property, we hold them individually liable for their unwarranted conduct.

V

In sum, the County is not liable for damages done to Garrison's residence as a consequence of the unilateral acts of the individual defendants, who were not policymakers of the County. The individual defendants, who are not entitled to qualified immunity, must stand accountable for their deliberate and willful acts when, although they knew Garrison's residence was not covered by the ALJ's order, they intentionally called for the destruction of Garrison's residence because, in their view, avoiding clearly established procedures would be cheaper. However, we reverse the judgment of the court of appeals as to the fire damaged building. Plaintiffs did not seek damages for its destruction, and on the record before us, we express no opinion as to claims for damages related to the fire damaged building.

Accordingly, we affirm the court of appeals in part, reverse in part, and remand to that court with directions that it return this case to the trial court for further proceedings consistent with this opinion.

JUSTICE MULLARKEY concurs in part and dissents in part, and JUSTICE KOURLIS joins in the partial concurrence and dissent.

County of Adams v. Hibbard, No. 94SC757

JUSTICE MULLARKEY concurring in part and dissenting in part:

I concur in the majority's partial reversal of the court of appeals' judgment. I respectfully dissent, however, from the majority's holding that the individual defendants, Robert J. Loew and Darrel L. Matteson, violated the procedural and substantive due process rights of the plaintiffs, Dean Hibbard and H.D. Garrison.

The plaintiffs brought this action in the district court alleging an unlawful taking of their property and the deprivation of their due process rights. The takings claim has been abandoned in this court and the majority rightly does not address that claim. The due process claim, as pled in the complaint, did not specify whether the plaintiffs were asserting a procedural due process claim or a substantive due process claim or both. The trial court, relying on the plaintiffs' written final argument, interpreted the due process claim as procedural. My review of the plaintiffs' final argument shows the plaintiffs argued only that they had not had proper notice and an opportunity to be heard. Thus, I agree with the trial court that only a procedural due process claim was asserted.[1]

On the merits, the trial court found that the plaintiffs had waived any procedural due process claim by failing to timely perfect their appeal of the Administrative Law Judge's (ALJ's) decision. The plaintiffs' attempt to appeal pursuant to C.R.C.P. 106(l)(4) was dismissed as untimely and that decision was not appealed.

Despite the trial court's ruling, the majority concludes that the individual defendants "deliberately deprived plaintiffs of their procedural and substantive due process rights." Maj. op. at 22. I disagree. In my view, the trial court properly disposed of the procedural due process claim when it found that there was no violation. Having failed to present a substantive due process claim at trial, the plaintiffs are foreclosed from asserting such claim on appeal. Assuming, *arguendo,* that the substantive due process claim is properly before us, the trial court's factual findings do not support the majority's conclusion that the individual defendants violated the plaintiffs' substantive due process rights.

Turning first to the procedural due process claim, the law is clear that a procedural due process claim may not be brought pursuant to 42 U.S.C. § 1983 (1988) if there is an adequate state remedy. *Zinermon v. Burch,* 494 U.S. 113 (1990). Here the trial court correctly concluded that the plaintiffs had no procedural due process claim because they failed to pursue their remedies under C.R.C.P. 106(a)(4).

Second, a substantive due process claim cannot be raised for the first time on appeal. "It is axiomatic that in any appellate proceeding this court may consider only issues that have actually been determined by another court or agency and have been properly presented for our consideration." *Committee for Better Health Care for All Colo. Citizens v. Meyer,* 830 P.2d 884, 888 (Colo. 1992) (citing *Dempsey v. Romer,* 825 P.2d 44, 57 n.13 (Colo. 1992); *Colgan v. State, Dept. of Revenue, Motor Vehicle Div.,* 623 P.2d 871, 874 (Colo. 1981)).

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[1] The court of appeals did not address the nature of the due process claim and stated only in conclusory terms that the action of the individual defendants was "a taking of property without compensation and without due process of law." *Hibbard v. County of Adams,* 900 P.2d 1254, 1264 (Colo. App. 1994).

Third, assuming the claim is properly before us, the plaintiff cannot prevail on substantive due process because the trial court's factual findings do not support that claim. "If appellant's § 1983 claim is construed to be based on an alleged violation of substantive due process, then the claim must be based either on a violation of an explicit constitutional guarantee (*e.g.,* a fourth amendment illegal seizure violation) or on behavior by a state actor that *shocks the conscience.*" *Braley v. City of Pontiac,* 906 F.2d 220, 225 (6th Cir. 1990)(emphasis supplied).[2] *See also Haag v. Cuyahoga County,* 619 F. Supp. 262, 278 (N.D. Ohio 1985) (a substantive due process claim may be pursued under § 1983 only if the conduct rises to the level of a constitutional tort, *i.e.,* it shocks the conscience), *aff'd without op.,* 798 F.2d 1414 (6th Cir. 1986). The trial court's findings do not support the conclusion that the individual defendants' conduct shocks the conscience. It found that the individual defendants' conduct was willful but not egregious. Such findings do not equate to a showing that their conduct shocks the conscience.

The pivotal issue at trial was whether the ALJ's order authorized the destruction of a garage shop owned by Hibbard and used as a residence by Garrison. In addition to the fire-damaged building, the ALJ order identified the following as blight or blight factors:

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[2] In *Brown v. Hot, Sexy and Safer Productions, Inc.,* 68 F.3d 525 (lst Cir. 1995), the First Circuit Court of Appeals explained that a plaintiff may bring a substantive due process claim under two theories. The first requires the demonstration of deprivation of an identified liberty or property interest protected by the Fourteenth Amendment. *Id.* at 531. The second does not require proof of the deprivation of a specific property or liberty interest; rather the plaintiff must prove that the state's conduct "shocks the conscience." *Id.* (quoting *Rochin v. California,* 342 U.S. 165, 172 (1952)).

> junk, loose trash, a semi-trailer, fence posts, barricades, tires, wood, bricks, cones, metal junk, piles of asphalt, acetylene tank, rusted containers, cinder blocks, trash, rusted trailers, an inoperable and unsightly van, an inoperable pickup truck, old and unsightly out-buildings, an old and rusted motor cart, and parts of machinery and appliances.

In its oral ruling, the trial court found the phrase "old and unsightly outbuildings" to be ambiguous and its meaning could not be determined from the four corners of the ALJ's order. To determine whether the garage shop was covered by that phrase, the court resorted to extrinsic evidence, including the transcript of the administrative hearing. In its written order, the trial court reached the following conclusion:

> The question of whether the administrative law judge's order authorized the destruction of this garage shop building was debatable, because of the ambiguities in the order; however, since the Court finds and concludes that Defendant Matteson knew the garage shop building was not covered and so advised Defendant Loew, Defendants' conduct was willful.

Although it found the individual defendants' conduct willful, the trial court also found that their conduct was not so egregious as to support an award of punitive damages. In reaching its conclusions, the trial court found a number of extenuating circumstances. It initially found that the ALJ, not the county, had drafted the order and that the order was ambiguous. The court emphasized that the individual defendants' conduct should be evaluated in light of the fact that the overall property was in very bad condition and described the property as: "cluttered, messy, unattractive, ill-kempt [sic], [and] deteriorated." Testimony at trial indicated that the garage shop, where plaintiff Garrison was living, had no running water or sewer, and raw sewage had been dumped behind the building. Some of the windows had been boarded up. Photographs used as exhibits at trial show that the garage shop was similar in appearance to the fire-damaged building and other out-buildings. According to the court, the garage shop was not easily distinguishable from other property slated for destruction. In the court's words, it was not a question of "one eyesore in the midst of a manicured garden [that] can be easily singled out for surgical excision."

After the blight clearance process had begun, it was halted by a temporary restraining order obtained by the plaintiffs. The county and individual defendants complied with the court order and the garage shop was not demolished until after the order had been dissolved due to the failure of plaintiffs to file a complaint.

The trial court also noted that the plaintiffs were not present when the razing occurred. It found:

> [T]his lack of guidance, assistance and objection makes it much less apparent in the Court's mind that Defendants acted in an overly egregious manner. Apparently Defendant [sic] Garrison did arrive prior to the time the 'garage shop' building which he occupied as an *ad hoc* residence was razed, but refused to remove his belongings, expressing his preference to force the county (presumably *via* a lawsuit) to pay him for his belongings.

Thus, the trial court's finding that the individual defendants' conduct was not egregious was based on its assessment of the ALJ's order, the general disrepair of the property including the garage shop, and plaintiffs' actions.

The trial court's conclusion that the individual defendants' conduct was willful was based on its review of the administrative hearing transcript. It cites to pages of the transcript as showing that "it is uncontrovertible" that removal of the garage shop was not authorized by the ALJ's order. Since that transcript is not in the record before this court, we cannot review it. Whatever occurred at that hearing cannot be a basis for this court to evaluate the actions of the individual defendants.

To support its finding of a section 1983 violation, however, the majority states that the "individual defendants improperly razed buildings [sic] under the belief that a lawsuit would be 'cheaper' than according plaintiffs the benefit of the process contemplated under Ordinance No. 3." Maj. op. at 22. This statement is based on the testimony at trial of Lieutenant Ronald Blasko of the Adams County Sheriff's Department. Blasko testified that he had overheard the following conversation between the two individual defendants regarding the garage shop building:

> Well, I overheard Mr. Loew — in fact he pointed at a building and asked Mr. Matteson if that building was on the order; and Mr. Matteson replied that it wasn't.
>
> Mr. Loew had instructed him to tear it down, stating "It would be cheaper if he sued me."

Both Matteson and Loew testified at trial and denied that Loew had made the lawsuit statement attributed to him by Blasko. Matteson testified, "That statement was never made." Loew gave similar testimony.

Both Matteson and Loew acknowledged that they had discussed being sued over this matter and that the discussion was within Blasko's hearing. Matteson, who had had several previous encounters with Hibbard in regard to this and other properties, testified that he told Loew that Hibbard frequently threatened to sue Matteson "and have everything I owned." Loew testified that Blasko asked him if he, Blasko, would be sued. Loew said he explained to Blasko that the matter already had been in litigation with respect to the temporary restraining order. Loew also stated:

> and I tried to allay his (Blasko's] fears about being personally sued. I said, "We are more likely to be sued than you will be."

The trial court did not resolve the factual dispute about Loew's alleged lawsuit statement. As noted above, although the trial court found that Matteson told Loew that the garage shop was not within the scope of the ALJ's order, it also found that the individual defendants' conduct was not sufficiently egregious to support an award of punitive damages against them. The latter conclusion appears to be an implicit rejection by the trial court of Blasko's testimony on the lawsuit statement.

Despite the lack of trial court findings on this contested issue of fact, the majority credits Blasko's allegation and makes it the key to its finding of section 1983 liability. In my view, it is improper for this court to resolve a disputed issue of fact by crediting the testimony of one witness over that of another. Making a credibility determination in a trial is not the function of an appellate court. "The credibility of witnesses, the sufficiency, probative effect, and weight of evidence, and the inferences and conclusions to be drawn therefrom, are all matters within the province of the trial court and will not be disturbed on review unless clearly erroneous." *O'Connor v. Rolfes*, 899 P.2d 227, 230 (Colo. App. 1994).

Based on the trial court's findings of fact, the individual defendants' conduct cannot fairly be said to shock the conscience. As the trial court stated in finding that the conduct was willful but not egregious, "all of the proceedings here had been contested, tempers had flared, and the decision to proceed was made while the demolition crew was on-site and acting." The individual defendants acted under the heat of the moment, and while their conduct was wrongful, it does not shock the conscience.

I am aware that section 1983 violations sometimes have been found when local officials have defied a court order. *See, e.g.*, *Robinson v. City of Seattle*, 830 P.2d 318 (Wash.) *cert. denied*, 113 S. Ct. 676 (1992). But as the *Robinson* case indicates, a finding of liability under section 1983 in such circumstances occurs only in the most extreme cases. For example, in the *Robinson* case, Seattle city officials continued to enforce a housing demolition license fee even though that requirement had been held unlawful in two lengthy series of cases in which Seattle was a party. I have found no case in which city officials have been held liable under section 1983 for violation of an administrative order.

Thus, I would conclude that the plaintiffs have not proven a constitutional tort. It may be that the plaintiffs can pursue common law torts such as trespass or conversion against the individual defendants, but, in my view, they have no claim against these defendants under 42 U.S.C. section 1983.

For these reasons, I concur in part and dissent in part from the majority's opinion.

JUSTICE KOURLIS joins in the partial concurrence and dissent.

CERTIFICATE OF MAILING

I hereby certify that on this 13th day of September 1996, a true and correct copy of the foregoing ***PETITIONERS' APPENDIX*** was mailed by placing the same in the United States Mail, postage prepaid, addressed as follows:

Gilbert Goldstein, Esq.
3600 S. Yosemite, Suite 870
Denver, CO 80237
303-220-8200
Attorney for Dean Hibbard & H.D. Garrison

Darrell L. Campbell, Esq.
7730 E. Belleview Ave.
Suite 204
Englewood, CO 80111-2618
303-740-7200
Attorney for Dean Hibbard & H.D. Garrison

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No. 96-425

In The

Supreme Court of the United States

October Term, 1996

◆

ROBERT J. LOEW and DARREL L. MATTESON,

Petitioners,

v.

DEAN HIBBARD and H.D. GARRISON,

Respondents.

◆

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado
Case No. 94SC757

◆

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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GILBERT GOLDSTEIN
3600 S. Yosemite
Suite 870
Denver, CO 80237
(303) 220-8200

* *Counsel of Record*

LAFF STEIN CAMPBELL
& TUCKER
DARREL L. CAMPBELL*
7730 East Belleview Avenue
Suite 204
Englewood, CO 80111-2618
(303) 740-7200

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

In 1988 the County of Adams, Colorado (the "County") adopted Ordinance No. 3 which was designed to eliminate "blighted areas" in the County. In pertinent part, the Ordinance provided that the exteriors of any commercial establishment or multi-family building shall be maintained so as to "present a neat and orderly appearance". Failure of the property owner to comply with the Ordinance requirements was deemed to be a "cause of blight" and subjected the owner to enforcement proceedings.

In the event of a violation of the Ordinance, a notice is given to the owner of the property directing that the property be brought into compliance. If the offending building is not removed, a hearing is held and an administrative law judge (ALJ) must make findings as to whether causes of blight exist. If the ALJ finds that such conditions exist and should be removed, an administrative order is issued requiring the owner to remove the causes of blight. Respondent Hibbard owned real property in Adams County upon which were located two commercial buildings, one of which had been damaged by fire in 1983 and had not been repaired. Respondent Garrison was living in the other building in which he maintained various items of personal property.

In 1989 the County alleged that Hibbard's property was maintained in violation of Ordinance No. 3 and gave notice to Respondents of such violation. A hearing was held before an ALJ who issued a written decision finding that certain "blight factors" existed on the property.

The ALJ's Order required the blight factors identified in the Order to be removed by a specified date. If the Respondents did not comply with the Order as directed, the County was authorized to enter onto the premises to remove the items described, and to charge the costs of such removal as a lien against the property.

When Respondents did not comply with the ALJ's order, the County then proceeded to "clean up" the property and remove the blight factors. In doing so the garage/shop building in which Garrison was living was demolished along with all of its contents. The garage/shop building was not the subject of the ALJ's blight removal order. According to one witness, Assistant County Attorney Matteson advised County Attorney Loew that the garage/shop building was not covered by the ALJ's order, but Loew ordered its destruction saying it would be "cheaper" to have the Respondents sue him.

Respondents then filed the within action. The Complaint sought a declaratory judgment that Ordinance No. 3 authorizing the destruction of buildings not presenting a "neat and orderly" appearance was invalid as not being authorized by any Colorado statute and was unconstitutionally vague. Respondents also sought a judgment for damages against the County and Petitioners Loew and Matteson based upon the destruction of the second building, the items of personal property inside the building and for the damage to the underground tank, pump and well.

After trial, the court determined that the ALJ's Order did not authorize the destruction of the second building nor the removal of personalty within it. It also found that the individual Petitioners knew that the ALJ's Order did not apply to such items, but willfully ordered their destruction in violation of Respondents' constitutional rights. The court concluded that Respondents had been deprived of their civil rights without due process of law and that Respondents' property had been taken without just compensation. Hibbard was awarded $10,000.00 for the destruction of the second building and Garrison $3,500.00 for the personal property destroyed in the second building. The validity of Ordinance No. 3 was upheld by the trial court.

The Colorado Court of Appeals affirmed in part and reversed in part. The court held that Ordinance No. 3 was invalid for the reason that no state statute empowered the County to pass an ordinance authorizing the destruction and removal of buildings that do not present a "neat and orderly" appearance. The court held that the County was liable under 42 U.S.C. § 1983 because Ordinance No. 3 constituted a "policy" adopted by the County which resulted in the taking of Respondents' property without compensation and without due process of law. The court also held the County liable because of the individual County Attorneys' interpretation of the ALJ's Order to include the second building. The court reasoned that the interpretation placed on the ALJ's Order by the County Attorney and his assistant constituted the adoption of an official County policy and further that the County had specifically adopted this interpretation by urging the correctness of said interpretation both in the trial court and before the Court of Appeals.

The Court of Appeals held that the individual Petitioners Loew and Matteson were not entitled to qualified immunity for the destruction of the second building since they "knew" that the ALJ's Order did not cover it. The individual Petitioners were charged with knowledge that the County's deliberate destruction of the private property constituted an unlawful taking without compensation and a denial of due process of law.

The Court of Appeals concluded that the trial court erred in refusing to award any damages for the underground tank, pump and well if such damage resulted from the County's unauthorized destruction of the fire damaged building. The court further determined that only the County and not the individual Petitioners would be liable for such destruction. Finally, the court remanded the matter for redetermination of attorneys' fees pursuant to 42 U.S.C. § 1988.

The Colorado Supreme Court granted certiorari with respect to the following two issues:

1. Whether the Court of Appeals erred in holding the County liable for destruction of property under 42 U.S.C. § 1983.

2. Whether the Court of Appeals erred in holding the County attorneys liable for destruction of property under 42 U.S.C. § 1983.

The Colorado Supreme Court first held that the Court of Appeals erred in holding the County liable under 42 U.S.C. § 1983. The Court reasoned that the two individual county attorneys were not "policy-makers" as a matter of law. The Colorado Supreme Court also held that the individual attorneys were liable under 42 U.S.C. § 1983. 918 P. 2d at 220-221. The court found that the county attorneys deprived Respondents of their procedural and substantive due process rights by causing the destruction of their property. 918 P. 2d at 221.

◆

CORRECTION OF MISSTATEMENT IN PETITIONERS' APPENDIX

The Appendix accompanying the Petition for Writ of Certiorari includes a copy of the decisions rendered by the district court, Colorado Court of Appeals and the Colorado Supreme Court.

Petitioners have misrepresented to this Court the opinion of the Colorado Court of Appeals. In response to a petition for rehearing the Colorado Court of Appeals modified its original opinion in several respects including the following paragraph which was substituted for the third paragraph found at p. 17a of Petitioners' Appendix:

> The county attorney testified that he was the highest ranking county official present at the property when the two buildings were destroyed, and, as such official, he was there "to oversee and give any direction, assistance, advice that I could." At that time, a "debate" over the question whether the second building was covered by the ALJ's order occurred. According to one witness, the assistant county attorney advised the county attorney that the order did not cover the second building, but the county attorney ordered its destruction on the basis that would be "cheaper" to have plaintiffs sue him. In any event, the two attorneys conferred with the county's zoning administrator who was responsible for directing the physical

work on the site, and a "consensus" was reached that the second building would be destroyed.

A copy of the pertinent part of the Colorado Court of Appeals' modification of the original opinion is set forth in the Appendix attached to Respondents' Brief.

◆

REASONS FOR DENYING THE PETITION

I. The Colorado Supreme Court followed well settled decisions of this Court in upholding Respondents' Section 1983 civil rights claim for violation of Respondents' right to substantive due process

Petitioners' contention that the Colorado Supreme Court has, in the case at bar, created a new "generic" Section 1983 claim for alleged flagrant governmental conduct, is without basis. The Colorado Supreme Court in affirming Respondents' civil rights claim merely applied the long established decisional law of this Court and lower courts to the facts of this case. Those facts unequivocally confirm that Respondents were denied due process of law when Petitioners deliberately disregarded the law and deprived Respondents of their property.

The Due Process Clause of the Fourteenth Amendment serves to prevent governmental power from being used as an instrument of oppression. *Collins v. City of Harker Heights*, 503 U.S. 115, 126, 112 S. Ct. 1061, 1069, 117 L. Ed. 2d 249 (1989). Historically, it has been applied to deliberate decisions of government officials that deprive a person of life, liberty or property. *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662 (1986). Due process protects citizens from the deprivation of liberty by deliberate abusive or harsh conduct by state officials. *Rochin v. California,* 342 U.S. 165, 169-171, 72 S. Ct. 205, 208-209, 96 L. Ed. 183 (1952); *Hewitt v. City of Truth or Consequences,* 758 F.2d 1375, 1379 (10th Cir.), *cert. denied,* 474 U.S. 844, 106 S. Ct. 131, 88 L. Ed. 2d 108 (1985); *Gumz v. Morrissette,* 772 F.2d 1395, 1400 (7th Cir. 1985), *cert. denied,* 475 U.S. 1123, 106 S. Ct. 1644, 90 L. Ed. 2d 189 (1986).

A substantive due process violation occurs when state's action is so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency. *Sylvia Development Corp. v. Calvert County, MD,* 48 F.3d 810, 827 (4th Cir. 1995). The protection covers state action which is so "arbitrary and irrational, so unjustified by any circumstance or government interest, as to be literally incapable of avoidance by any predeprivation procedural protections or of adequate rectification by a post-deprivation state remedies". *Rucker v. Harford County,* 946 F.2d 278, 281 (4th Cir. 1991), *cert. denied,* 502 U.S. 1097, 112, S. Ct. 1175, 117 L. Ed. 2d 420 (1992).

Although not all misconduct by state officials is subject to redress under 42 U.S.C. § 1983, excessive force or other outrageous abuse of government authority directed against citizens is the type of misconduct which the remedies of Section 1983 were designed to deter. In the case at bar the conduct of the government officials in deliberately depriving Respondents of their property in open defiance of the law is so outrageous as to shock the conscience of the Court.

Intentional misconduct by government officials is properly redressed under Section 1983 where it evidences an outrageous abuse of government authority. When government officials abuse their offices, actions for damages may be the only realistic avenue for vindicated constitutional guarantees. *Harlow v. Fitzgerald,* 574 U.S. 800, 814, 102 S. Ct. 2727, 2736, 73 L. Ed. 2d 396 (1982). To succeed on a civil rights claim for violation of substantive due process, a plaintiff must at least show that state officials were guilty of grave unfairness in the discharge of their legal responsibilities. *Silverman v. Barry,* 845 F.2d 1072, 1080 (D.C. Cir.), *cert. denied,* 488 U.S. 956, 109 S. Ct. 394, 102 L. Ed. 2d 383 (1988). Only a substantial infringement of state law prompted by personal or group animus, or a deliberate flaunting of the law that trammels significant personal or property rights, qualifies for relief under Section 1983. *Silverman v. Barry,* at 1072.

The egregious conduct of Petitioners which gives rise to Respondents' civil rights claim for denial of due process is set forth in detail in the opinions of the district court, Colorado Court of Appeals and the Colorado Supreme Court. (See, Petitioners' Appendix) Each of the lower court opinions confirms that Petitioners deliberately flaunted the law and disregarded the State's fundamental process in ordering the destruction of Respondents' property. Although the state court opinions stress the reprehensible nature of the government officials' conduct in finding a violation of Respondents' civil rights, the request for review filed by Petitioners herein is conspicuous for its silence as to this issue.

In the district court's decision, the court found the evidence to be "incontrovertible" that the garage/shop building (also known as the "Garrison residence") located toward the rear of the property was not contemplated in the County's blight request or the administrative law judge's Order to remove the blight. (Petitioners' Appendix, p. 4a) The trial court went on to find that Matteson "knew" the garage/shop building was not covered and so advised Loew. Despite such knowledge, Petitioners ordered the destruction of Respondents' property. (Petitioners' Appendix, p. 6a)

The Colorado Court of Appeals modified its original opinion to include the record excerpt establishing Loew and Matteson's knowledge of the unlawfulness of their actions:

> The County Attorney testified that he was the highest ranking County official present at the property when two buildings were destroyed, and, as such official, he was there to "oversee and give any directions, assistance, advice that I could". At that time, a "debate" over the question whether the second building was covered by the ALJ's Order occurred. *According to one witness, the Assistant County Attorney advised the County Attorney that the Order did not cover the second building, but the County Attorney ordered its destruction on the basis that it would be "cheaper" to have plaintiffs sue him.* In any event, the two attorneys conferred with the County's Zoning Administrator who was responsible for directing the physical work on the site, and a "consensus" was reached that the second building would be destroyed. (Emphasis added.) (Respondents' Appendix p. 2a)

The failure to include the final text of the Colorado Court of Appeals' modified opinion in Petitioners' Appendix or in any way reference the modification reveals not only a lack of candor on the part of Petitioners but also a blatant attempt to avoid any mention of the egregious nature of Petitioners' conduct. Review of Respondents' civil rights claims cannot be accomplished in a vacuum.

In upholding Respondents' civil rights claim the Colorado Supreme Court stressed Petitioners' deliberate and willful abuse of authority. The Colorado Supreme Court noted that where the conduct of public officials results in the intentional and knowing destruction of private property such conduct should be repudiated and the subject of reproach. (Petitioners' Appendix, p. 45a) Any public official who knowingly and consciously acts outside the authority of the government to deprive citizens of their property, must answer for damages pursuant to Section 1983 for the deliberate deprivation of procedural and substantive due process rights.

There can be no question that a cause of action is established for violation of substantive due process where a party has been injured by the government's deliberate disregard of fundamental legal processes. *Roy v. City of Augusta*, 712 F.2d 1517, 1524 (1st Cir. 1983); *Dominion Cogen, D.C., Inc. v. District of Columbia*, 878 F. Supp. 258, 264 (D.D.C. 1995); and *Bremiller v. Cleveland Psychiatric Institute*, 879 F. Supp. 782, 792 (N.D. Ohio 1995) (a Section 1983 claim can be maintained for substantive due process where the state actor's conduct shocks the conscience of the court. Under such circumstances the adequacy of any state remedy is irrelevant.)

Petitioners' insistence that Respondents' civil rights claim is nothing more than a garden variety land use regulation case involving a taking ignores the government officials' conduct and the lack of any explanation that could justify the irrational and arbitrary abuse of government power. Respondents' property was not taken by the state for public or private use. Respondents' property was simply out and out destroyed by government officials, who although attorneys learned in the law, viewed themselves above the law, immune from the consequences of their acts.

Petitioners' argument that Respondents' due process claim is subsumed by the Just Compensation Clause of the Fifth Amendment is not persuasive. The Colorado Supreme Court did not err in resolving Respondents' claim based upon substantive due process principles.

This Court has previously rejected the position that one constitutional Amendment preempts the guarantees of another. The proper question is not which Amendment controls but whether either Amendment is violated. See, *Soldal v. Cook County,* 506 U.S. 56, 113 S. Ct. 538, 543, 121 L. Ed. 2d 450 (1992) ("Certain wrongs affect more than a single right, and accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter, the claim's 'dominant' character. Rather we examine each Constitutional provision in turn."); *United States v. James Daniel Good Real Property,* 510 U.S. 43, 49-50, 114 S. Ct. 492, 495, 126 L. Ed. 2d 490 (1993); *Albright v. Oliver,* 510 U.S. 266, 286-287, 114 S. Ct. 807, 820, 127 L. Ed. 2d 114 (1994), Souter, J., concurring.

The record in the within case establishes a violation of the Fifth Amendment prohibition against a taking without just compensation and a violation of the Fourteenth Amendment right to due process of law. Petitioners attempt to compel Respondents to proceed solely on the taking claim without regard for any due process violation cannot be justified. No authority has been cited to support the proposition that the Fifth Amendment is the beginning and end of the constitutional inquiry when property has been deliberately taken by government officials contrary to law and without notice or hearing.

The case authority cited by Petitioners holding substantive due process inapplicable to land use disputes is not dispositive. To characterize Respondents' claim as a run of the mill local land use dispute involving a mere difference of opinion on development ignores the deliberate taking of property effected by high level government officials who knew their action was unlawful. Such conduct goes far beyond the outer limits of legitimate government action, and violates the Due Process Clause.

The Colorado Supreme Court's due process analysis of Respondents' civil rights claim cannot be dispensed as being redundant of a Fifth Amendment Just Compensation Clause taking claim. The Fifth Amendment provides no explicit textual source for the remedy afforded individuals who have been victimized by government officials flaunting the law without regard for the legal process. To adopt Petitioners' position is to condone the premise that when the damages resulting from a denial of an individual's rights are believed to be limited, it is both "cheaper" and proper under the law to deny the person's civil rights rather than afford him due process. Such reasoning flies in the face of the Fourteenth Amendment and the Congressional mandate of 42 U.S.C. § 1983.

The position urged by Petitioners represents an unwarranted extension of the *Albright* doctrine which is contrary to the well established law of this Court. No individual is above the law. Petitioners' blatant abuse of authority shocks the conscience. The deliberate and knowing destruction of private property constitutes a willful deprivation of civil rights without due process of law. Respondents' property can never be restored. Any post-deprivation remedy is irrelevant and could never adequately cure the violation of Respondents' rights because the constitutional tort was complete the moment the substantive due process violation occurred. See, *Zinermon v. Burch*, 494 U.S. 108, 126, 110 S. Ct. 975, 983, 108 L. Ed. 2d 93 (1990); *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). Petitioners' abuse of authority is the type of wrongful conduct for which 42 U.S.C. § 1983 was intended to provide relief.

II. The Colorado Supreme Court decision followed well established decisions of this Court in upholding Respondents' Section 1983 claim for violation of Respondents' right to procedural due process

In affirming Respondents' civil rights claim against the individual Petitioners, the Colorado Supreme Court held that Petitioners deliberately deprived Respondents of their right to procedural, as well as substantive due process. (Petitioners' Appendix, p. 45a) The procedural due process violation results from the finding that Petitioners knew the garage/shop building was not covered by the ALJ's Order, yet Petitioners ordered the building and its contents destroyed on the belief that a lawsuit would be "cheaper" than according Respondents the benefit of the process contemplated under Ordinance No. 3. (Petitioners' Appendix p. 44a)

Petitioners made no attempt to comply with even the minimal due process notice procedures set forth in Ordinance No. 3. As the County's chief legal advisors, Petitioners knew that a building could not be removed as a blight factor unless notice was given to the owner and a hearing held before an administrative law judge who would then decide whether a cause of blight existed. (Petitioners' Appendix, p. 30a) Despite knowing that the garage/shop building was not covered by the ALJ's Order, Petitioners ordered its destruction without giving Respondents prior notice or the opportunity for hearing.

Government officials are entitled to qualified immunity only so long as their actions can reasonably have been thought to be consistent with the rights they are alleged to have violated. If, on the other hand, it is established that the official violated "clearly established law", the official may be held personally liable for the alleged unlawful action. *Anderson v. Creighton,* 483 U.S. 635, 638-639, 107 S. Ct. 3034, 3038-3039, 97 L. Ed. 2d 523 (1987). In the case at bar since the law concerning an individual's right to procedural due process was clearly established at the time of Petitioners' actions herein, Petitioners are personally liable for the violation of Respondents' right to due process.

The basic procedural due process protections afforded every individual by reason of the Fifth and Fourteenth Amendments to the Constitution have long been recognized as established law. The Court in *Mullane* *v. Central Hanover Bank & Trust,* 389 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950) recognized that due process requires any deprivation of life, liberty or property to be preceded by notice and an opportunity for hearing. In *Boddie v. Connecticut,* 401 U.S. 371, 378, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 (1971) the Court held that procedural due process requires adequate notice and an opportunity to be heard at meaningful time and in a meaningful manner. See also, *Parratt v. Taylor,* 451 U.S. 527, 540, 101 S. Ct. 1908, 1915, 68 L. Ed. 2d 420 (1981) ("Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interest.")

Imputing to government officials' knowledge of the well established law concerning procedural due process is particularly appropriate in the instant case where the Petitioners are the County's chief legal advisors, licensed attorneys who are learned in the law. Petitioners Loew and Matteson were fully aware that if property owned by Respondents, but not listed in the ALJ's Order, was taken without first providing Respondents an opportunity for hearing, Respondents' right to due process of law would be denied. See, *Chalkboard, Inc. v. Brandt,* 902 F.2d 1375, 1382 (9th Cir. 1989), *cert. denied,* 498 U.S. 980, 111, S. Ct. 509, 112 L. Ed. 2d 528 (1990) (The principle of due process that an individual be given an opportunity for hearing before he is deprived of his life, liberty or property is so well established that reasonable state officers would have known of it.)

Petitioners also understood that once the building was razed and the personal property hauled to the landfill, Respondents would be forever deprived of their property. Compelling Respondents to file a legal action for damages after the property was razed was in Petitioners' minds "cheaper" than providing Respondents with notice and the opportunity for hearing before the ALJ who had previously heard the County complaints and had not designated the garage/shop building as a blight factor. Rather than afford due process, Petitioners took the law into their own hands.

Petitioners' argument that the takings clause of the Fifth Amendment preempts any separate analysis of Respondents' procedural due process claim is direct contravention of the established case law confirming a citizen's right to notice and hearing before final deprivation of property rights. To follow such argument to its logical conclusion is to nullify the Due Process Clause in contravention of the Fourteenth Amendment.

The alleged preemption by the takings claim is also inconsistent with the case of *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) cited by Petitioners. In *Armendariz* the plaintiffs asserted both procedural and substantive due process claims. While the substantive due process claim was dismissed as being duplicative of the Fifth Amendment taking clause, the procedural due process claim, alleging a taking of property without predeprivation notice and hearing, was not found to be precluded by the Fifth Amendment. *Armendariz* confirms that the Fifth Amendment Just Compensation Clause cannot be considered an explicit textual provision of the Constitution which prohibits any additional relief for violation of procedural due process.

The Colorado Supreme Court properly upheld Respondents' Section 1983 claim for the intentional denial of Respondents' right to procedural due process. A more blatant denial of individual rights than presented in the case at bar is difficult to imagine, especially given the fact that Petitioners are licensed attorneys steeped in the procedural aspects of due process. Petitioners having ordered the demolition of a building known to not be covered by the ALJ's Order, and without prior notice or the opportunity for hearing, were properly held liable for the denial of Respondents' civil rights.

III. Respondents' due process claim was not satisfied by post-deprivation procedures available under Colorado law

A. The exceptions authorizing post-deprivation hearing to satisfy due process are not present in the within case

Petitioners acknowledge that the doctrine established by *Parratt v. Taylor*, supra, and its prodigy concerning post-deprivation state remedies satisfying the Due Process Clause has never been applied to the circumstances presented in the case at bar. A review of *Parratt* confirms that an extension of the *Parratt* doctrine is not warranted in the within case for the reason that the Colorado Supreme Court's decision upholding Respondents' civil rights claim for violation of procedural due process is consistent with the well established law of this Court.

The Court in *Parratt* noted that past cases mandate that some kind of hearing is required at some time before a state finally deprives a person of his property interest.

See, *Parratt v. Taylor*, 451 U.S. at p. 540, 101 S. Ct. at 1915. While acknowledging that a hearing must be provided before final deprivation, the Court recognized that in certain extraordinary situations, a post-deprivation hearing may satisfy due process. A post-deprivation hearing may be appropriate if there is a necessity for quick action by the state or it is impractical for the state to provide any meaningful pre-deprivation process and there is available, a meaningful means by which to assess the propriety of the state's action at some time after the initial taking. See, *Parratt v. Taylor*, 451 U.S. at p. 539, 101 S. Ct. at 1915.

The extraordinary circumstances authorizing a post-deprivation hearing in lieu of prior notice before a taking, are not present in the instant case. There was no need for immediate quick action to eliminate the garage/shop building as a blight factor. Prosecution of the blight claim had been pending for months prior to the razing of the building in November, 1989. Nor was it impractical to provide a hearing before the County demolished the building not covered by the ALJ's blight Order. Petitioners could have delayed demolition of the building until the ALJ had reviewed the County's request for an order specifically authorizing demolition of the garage/shop building as a blight factor. The means were available to assess the propriety of Petitioners' demolition order through an independent review by an ALJ. Despite the absence of any emergency requiring immediate action and the availability of independent review, Petitioners deliberately chose to ignore even the most rudimentary elements of due process in the taking of Respondents' property.

The deprivation of Respondents' property rights became final once the building and its contents was demolished. Respondents were at that point no longer able to obtain timely judicial review of Petitioners' decision. The inadequacy of any post-deprivation hearing in such circumstances is obvious. The property owners could never be restored to the position they occupied before Petitioners deliberately chose to deprive Respondents of their property without notice or hearing. Post-deprivation review under such circumstances would not be due process.

The circuit courts' interpretation of *Parratt* supports Respondents' position herein. The case of *Burtnieks v. City of New York*, 716 F.2d 982, 988 (2d Cir. 1983) applied *Parratt* to a civil rights claim involving city officials who wrongfully ordered the demolition of a building without giving prior notice as required by the due process and the state's administrative code. In reversing the dismissal of the Section 1983 claim for violation of due process, the second circuit noted that under the *Parratt* doctrine before the question of the adequacy of post-deprivation state remedies is to be considered, the court must first find the necessity for quick action or the impracticality of providing any pre-deprivation process.

The ninth circuit in the case of *Chalkboard, Inc. v. Brandt*, supra, also addressed the deprivation of procedural due process occasioned by government officials who chose not to follow due process procedures specified by state law. In upholding the trial court's denial of the state officials' motion for summary judgment the ninth circuit emphasized that at the time of the suspension, some pre-termination opportunity for hearing was required before deprivation of the property interest. By ignoring the procedures and summarily suspending the license without notice or opportunity to respond, the state officials would have known their actions were unlawful and denied due process. Absent the showing of an actual emergency, pre-termination notice and hearing was required.

The case law confirms that a post-deprivation hearing is only acceptable for due process purposes if an actual emergency exists making it impractical to provide a pre-deprivation notice. The Colorado Supreme Court recognized that no emergency was present in the within case and properly disregarded the claim that a post-deprivation hearing could satisfy Respondents' right to procedural due process of law.

B. Colorado law does not provide an adequate remedy if the State denies just compensation for the taking of an individual's property

Assuming for purposes of argument that the *Parratt* doctrine could be extended to land use cases like the case at bar, Respondents' injury would still be complete because adequate state procedures were not available to remedy the violation of procedural due process and assure just payment for property wrongfully taken.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 196, 105 S. Ct. 3108, 3121, 87

L. Ed. 2d 126 (1985), the Court recognized that the availability of an inverse condemnation claim under state law presented an adequate post-deprivation remedy which a plaintiff must pursue before bringing a claim for an unlawful taking under the Fifth Amendment of the Constitution. Petitioners now urge that the ripeness doctrine established in *Williamson* when read in conjunction with *Parratt* requires that Respondents herein exhaust their post-deprivation remedies under Colorado law before claiming a violation of due process under the Fourteenth Amendment. Although Respondents reject Petitioners' argument and assert that it unjustifiably seeks to extend the doctrines established in *Parratt* and *Williamson*, even if such rationale was extended to a land use case, it has no application in the case at bar.

Petitioners' contention that Respondents could have pursued a state inverse condemnation action as an adequate post-deprivation remedy is not supported by Colorado law. The Colorado Supreme Court in the case of *State of Colorado Department of Health v. The Mill*, 809 P. 2d 434, 437 (Colo. 1981) stated:

> We hold that for a litigant to be able to sue a state entity in inverse condemnation, the state entity must possess the power of eminent domain at the time of the taking.

See also, *City and County of Denver v. Desert Truck Sales, Inc.*, 837 P. 2d 759, 766 (Colo. App. 1992) (Assuming that a governmental agency has the power of eminent domain, inverse condemnation is a short hand description for the manner in which the landowner recovers just compensation for the taking of his property when condemnation proceedings have not been filed.)

The Colorado Court of Appeals struck down the County's Ordinance No. 3 to the extent that it purported to authorize the County to destroy and remove buildings that did not present a "neat and orderly" appearance. In so ruling, the Court of Appeals found the ordinance was not authorized under the County's enabling statute. (Petitioners' Appendix, p. 14a) The County's lack of condemnation authority is dispositive of Respondents' alleged right to pursue an inverse condemnation action for just compensation resulting from the County's enforcement of Ordinance No. 3. An inverse condemnation claim was not authorized under state law because the County did not have condemnation authority.

The circuit courts applying the *Williamson* obligation to exhaust post-deprivation state remedies, confirm that the availability of a state law inverse condemnation action is determinative of a property owner's duty to exhaust state law post-deprivation remedies. See, *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir.), *cert. denied*, 502 U.S. 1096, 112 S. Ct. 1174, 117 L. Ed. 2d 419 (1991) (In those states that allow an aggrieved property owner to bring an inverse condemnation action a Fifth Amendment takings claim is not ripe until the aggrieved party has used this procedure and been denied compensation); *G.M. Engineers & Associates, Inc. v. West Bloomfield Township*, 922 F.2d 328, 331 (6th Cir. 1990) (In order to state a claim for violation of the just compensation clause, a plaintiff must show that the inverse condemnation procedure is unavailable or inadequate); *Christensen v. Yolo County Board of Supervisors*, 995 F.2d 161, 164 (9th Cir. 1993) (An action for compensation under state law will be deemed futile if a plaintiff can show a landowner is not able to obtain just compensation through an inverse condemnation action); *Estate of Himelstein v. City of Ft. Wayne, Indiana*, 898 F.2d 573 (7th Cir. 1990); and *Crooked Lake Development, Inc. v. Emmet County*, 763 F. Supp. 1398 (W.D. Mich. 1991).

The ninth circuit in the case of *Austin v. City and County of Honolulu*, 840 F.2d 678, 680-681 (9th Cir.), *cert. denied*, 488 U.S. 852, 109 S. Ct. 136, 102 L. Ed. 2d 109 (1988), considered the reasons why a property owner must show he has sought compensation through an inverse condemnation action before pursuing a Fifth Amendment takings claim. The circuit court in *Austin* noted that to prevail on an inverse condemnation action, the property owner must show that he or she has sought compensation and that the state denied it. Since this same proof is required for a Fifth Amendment taking claim, until the state courts establish that landowners may not obtain just compensation through an inverse condemnation action, state procedures will be deemed adequate.

The availability of an inverse condemnation claim distinguishes the instant case from the cases of *Yates v. Jamison*, 782 F.2d 1182 (4th Cir. 1986) and *Bateman v. City of West Bountiful*, 89 F.3d 704 (10th Cir. 1996) cited by Petitioners. In *Yates* a state statute regulated inverse condemnation claims providing an adequate post-deprivation state procedure for compensation. The court in *Bateman* noted that the Utah legislature had specifically waived sovereign immunity in a statute authorizing recovery against the government for the taking of property without just compensation. The State of Colorado in contrast has no inverse condemnation statute nor does the government immunity statute, Colorado Revised Statutes § 24-10-105 and 106, include any language specifically waiving sovereign immunity for an inverse condemnation taking.

The seminal case of *Parratt v. Taylor*, supra, is also distinguishable on the same grounds. In *Parratt* the Nebraska legislature had enacted a statute setting forth a tort claim procedure to pay the claims of prisoners housed in penal institutions. The state code procedure was available, but the inmate in *Parratt* chose not to use it.

Petitioners cannot cite any statutory provision passed by Colorado General Assembly establishing a state procedure whereby Respondents are entitled to prosecute an inverse condemnation claim in the circumstances presented in the within action. The Colorado Supreme Court decision in *The Mill* confirms that if the County lacked condemnation authority, Respondents could not have successfully pursued an inverse condemnation claim based upon the County's refusal to pay just compensation for property taken. The absence of any clearly defined and established state procedure setting forth a landowner's right to inverse condemnation refutes the argument that Respondents failed to exhaust post-deprivation state remedies.

◆

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

Gilbert Goldstein
3600 S. Yosemite
Suite 870
Denver, CO 80237
(303) 220-8200

* *Counsel of Record*

Laff Stein Campbell
& Tucker
Darrel L. Campbell*
7730 East Belleview Avenue
Suite 204
Englewood, CO 80111-2618
(303) 740-7200

Attorneys for Respondents

October 17, 1996.

APPENDIX

COLORADO COURT OF APPEALS November 3, 1994

Case No. 93 CA 0593

Dean Hibbard and H.D. Garrison,

Plaintiffs-Appellees and Cross-Appellants

v.

County of Adams, State of Colorado; Robert J. Loew; and Darrel L. Matteson,

Defendants-Appellants and Cross-Appellees

Appeal from the District Court of Adams County
Honorable Michael A. Obermeyer, Judge
Honorable Cindy H. Bruner, Judge
No. 89CV2876

Division I Opinion by JUDGE CRISWELL Metzger and Kapelke, JJ., concur	JUDGMENT AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND CAUSE REMANDED WITH DIRECTIONS

Opinion Modified, and as Modified, Petition for Rehearing, *DENIED*

Gilbert Goldstein, Denver, Colorado, Darrel L. Campbell, Denver, Colorado, for Plaintiffs-Appellees and Cross-Appellants

Gehler & Merrigan, Thomas E. Merrigan, Paula B. Gerlach, Commerce City, Colorado, for Defendants-Appellants and Cross-Appellees

OPINION is modified as follows:

Beginning on page 11, 28 lines from the top of the page, the following deletions (shown by overstriking) and additions (shown by bold italic) are made:

> ~~The two individual defendants were present on plaintiffs' property during the clean-up activities; they were, as the trial court found, the highest ranking county officials present. While there, the two individuals, one of whom was present representing the County throughout the previous administrative hearing, interpreted the ALJ's order as authorizing the destruction of the second building and so advised the county officials who were in charge of the clean-up operation.~~
>
> ***The county attorney testified that he was the highest ranking county official present at the property when the two buildings were destroyed, and, as such official, he was there "to oversee and give any direction, assistance, advice that I could." At that time, a "debate" over the question whether the second building was covered by the ALJ's order occurred. According to one witness, the assistant county attorney advised the county attorney that the order did not cover the second building, but the county attorney ordered its destruction on the basis that it would be "cheaper" to have plaintiffs sue him. In any event, the two attorneys conferred with the county's zoning administrator who was responsible for directing the physical work on the site, and a "consensus" was reached that the second building would be destroyed.***

Beginning on page 13, 7 lines from the top of the page, the following deletions (shown by overstriking) and additions (shown by bold italic) are made:

> building. ~~and so advised the other county employees at the scene.~~

Beginning on page 15, 12 lines from the top of the page, the following deletions (shown by overstriking) and additions (shown by bold italic) are made:

> interpreting the ALJ's order and of ***advising*** ~~providing legal advise to~~ other county officials ~~based upon~~ ***of*** that interpretation. Hence,

Beginning on page 21, 16 lines from the top of the page, the following deletions (shown by overstriking) and additions (shown by bold italic) are made:

> (recognizing rule).~~; *Overland Development co. v. Martson Slopes Development Co.*, 773 P. 2d 1112 (Colo. App. 1989) (applying same rule to award of fees under private contract).~~

[Page 11]

The county attorney in Colorado is a constitutional officer, appointed by the county commissioners. Colo. Const. art. XIV, §8; §30-11-118, C.R.S. (1986 Repl. Vol. 12A). The duties and responsibilities of the office were described by our supreme court in *Medberry v. People,* 107 Colo. 15, 19, 108 P. 2d 243, 245 (1940), as follows:

> Under the statues of Colorado a county attorney is employed primarily as the legal advisor of the county commissioners in whose discretion reposes the power of appointment. . . . *In certain matters he advises other county administrative officers,* appears for the county in cases involving dependent, neglected and delinquent children, in lunacy inquests and, when directed by the county commissioners, in civil litigation to which the county is a party or in which it is interested. (emphasis supplied)

Further, if, as defendants argue here, the adopting of Ordinance No. 3 was an exercise of the County's zoning authority, the county attorney is specifically invested, by statute, with the responsibility of enforcing its provisions. *See,* 30-28-124(2), C.R.S. (1986 Repl. Vol 12A). Indeed, in asserting that their actions here were subject to an absolute immunity, the individual defendants affirmatively allege that one of the responsibilities of their offices is to enforce the provisions of Ordinance No. 3.

The county attorney testified that he was the highest ranking county official present at the property when the two buildings were destroyed, and, as such official, he was there "to oversee and give any direction, assistance, advice that I could." At that time, a "debate" over the question whether the second [Page 12] building was covered by the ALJ's order occurred. According to one witness, the assistant county attorney advised the county attorney that the order did not cover the second building, but the county attorney ordered its destruction on the basis that it would be "cheaper" to have plaintiffs sue him. In any event, the two attorneys conferred with the county's zoning administrator who was responsible for directing the physical work on the site, and a "consensus" was reached that the second building would be destroyed.

With respect to the meaning and breadth of the ALJ's order, we are convinced that the interpretation placed upon it by the county attorney and his assistant constituted the adoption of an official county policy. Indeed, the County has specifically adopted that interpretation in these proceedings and has urged its correctness both in the trial court and before us. *See St. Louis v. Praprotnik, supra* (entity is liable for civil rights violation if it adopts policy of subordinate).

Given these circumstances, therefore, we conclude that the County is liable for any damages resulting to plaintiffs from the destruction of either building.

III. The Individual's Liability

Whether an individual public employee is a "policymaker," while important in determining the liability of a governmental unit under § 1983, is irrelevant in determining his or her own liability under that statute. This is so because, irrespective of the level of responsibility, a government official is

* * *